79-1136

Supreme Court, U. S.
FILED
JAN 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-

BROWN & ROOT, INC. and TRAVELERS INSURANCE COMPANY,

Petitioners

versus

MARY M. JOYNER, (widow of ARTHUR E. JOYNER), BENJAMIN F. STEWART and the BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondents

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

C. Michael Montgomery
George M. Kelley III
Seawell, McCoy, Dalton, Hughes,
Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510
Telephone: (804) 622-5341
Counsel for Petitioners

SUBJECT INDEX

Page

OPINIONS BELOW 1

JURISDICTION 3

QUESTIONS PRESENTED 3

STATUTORY PROVISIONS 4

STATEMENT OF THE CASE 5

REASONS FOR ALLOWANCE OF THE WRIT 9

CONCLUSION 24

CERTIFICATE OF SERVICE 25

APPENDIX A (Opinion of the United States Court of Appeals for the Fourth Circuit) A-1

APPENDIX B (Decision and Order of the Benefits Review Board, United States Department of Labor, January 12, 1978, in *Stewart* v. *Brown & Root, Inc., et al)* A-8

APPENDIX C (Decision and Order of the Benefits Review Board, United States Department of Labor, January 12, 1978, in *Joyner, etc.* v. *Brown & Root, Inc., et al)*..... A-19

APPENDIX D (Decision and Order of the Administrative Law Judge, September 30, 1976, *Stewart* v. *Brown & Root, Inc., et al)* A-24

APPENDIX E (Decision and Order of the Administrative Law Judge, October 15, 1976, *Joyner, etc.* v. *Brown & Root, Inc., et al)*..... A-30

APPENDIX F (Decision and Order on Remand of the Administrative Law Judge, March 6, 1978, *Stewart* v. *Brown & Root, Inc., et al)* A-36

APPENDIX G (Decision and Order on Remand of the Administrative Law Judge, February 17, 1978, *Joyner, etc.* v. *Brown & Root, Inc., et al)* A-40

APPENDIX H (Second Decision and Order of the Benefits Review Board, United States Department of Labor, July 24, 1978, *Stewart* v. *Brown & Root, Inc., et al)* A-45

APPENDIX I (Second Decision and Order of the Benefits Review Board, United States Department of Labor, July 24, 1978, *Joyner, etc.* v. *Brown & Root, Inc., et al)* A-50

AUTHORITIES CITED

Statutes: Page

33 U.S.C. §901 et seq., as amended, 1972 ..... *passim*

33 U.S.C. §902 (3) ..... 4 & *passim*

33 U.S.C. §903(a) ..... 5 & *passim*

33 U.S.C. §921(c) 5, 9

28 U.S.C. §1254(1) 3

Cases:

Alabama Dry Dock & Shipbuilding Co. v. *Kininess*, 554 F.2d 179 (5th Cir. 1976) *cert. denied* 434 U.S. 903 (1977) 10

Brown & Root, Inc. v. *Joyner*, 607 F.2d 1087 (4th Cir. 1979) 1, 16, 21

Crawford v. *Trotti & Thomason, Inc.*, 9 BRBS 685 (1979) 23

Dantes v. *Western Foundation Corp.*, 10 BRBS 541 (1979) 22

Dravo Corp. v. *Maxin*, 545 F.2d 374 (3rd Cir. 1976) *cert. denied*, 433 U.S. 908 (1977) 10

Fusco v. *Perini North River Assoc.*, 601 F.2d 659 (2nd Cir. 1979) 11, 15, 16, 20

Jacksonville Shipyards, Inc. v. *Perdue (Charles W. Skipper)*, 539 F.2d 533 (5th Cir. 1976). 11, 13, 15, 16, 18, 19

Massman Construction Co. v. *Silva*, No. 79-7129 (Ninth Cir.) 23

Newport News Shipbuilding & Dry Dock Co. v. *Graham*, 573 F.2d 167 (4th Cir. 1978) cert. denied 439 U.S. 979 (1978) 10

Northeast Marine Terminal Co., Inc. v. *Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977) 10, 11, 13, 16, 17, 22

P.C. Pfeiffer Co., Inc. v. *Ford*, No. 79-425, decided November 27, 1979, 48 U.S.L.W. 4018 (1979) . 10, 13, 17, 22

Perini North River Assoc. v. *Fusco*, No. 79-759 (Second Circuit) 20, 21

Ramos v. *Universal Dredging Corp.*, 10 BRBS 368 (1979) Appeal Nos. 79-7257, 79-7302 and 79-7285 (Ninth Circuit) 23

Sedmak v. *Perini North River Assoc.*, 9 BRBS 378 (1979) 15

Silva v. *Massman Construction Co.*, 9 BRBS 932 (1979) 23

Southern Pacific Co. v. *Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917) 12

Thibodaux v. *Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978) *cert. denied* ___U.S.___, 99 S.Ct. 2820 (1979) 11, 16

Trotti & Thomason, Inc. v. *Crawford*, No. 79-1793 (Fifth Circuit) 23

Western Foundation Corp. v. *Dantes*, No. 79-1358 (First Circuit) 23

Weyerhaeuser Co. v. *Gilmore*, 528 F.2d 957 (9th Cir. 1976) *cert. denied* 429 U.S. 868, 97 S.Ct. 179 (1976) 11, 12, 13, 14, 15, 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-

BROWN & ROOT, INC. and TRAVELERS INSURANCE COMPANY,

Petitioners

versus

MARY M. JOYNER, (widow of ARTHUR E. JOYNER), BENJAMIN F. STEWART and the BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondents

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Brown & Root, Inc. and Travelers Insurance Company, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit rendered in these proceedings on October 26, 1979.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals in *Brown & Root, Inc.*, v. *Joyner*, 607 F.2d 1087 (4th Cir. 1979)

appears at Appendix A. p. A1, the cases of *Joyner* and *Stewart* having been consolidated for argument and the opinion of the Court of Appeals having been rendered jointly.

The first and substantive Decision and Order of the U.S. Department of Labor, Benefits Review Board, was rendered in the *Stewart* case on January 12, 1978, is reported in 7 BRBS 356 (1978)* and appears at Appendix B, p. A-8. The companion Decision and Order of the U.S. Department of Labor, Benefits Review Board in the *Joyner* case, also rendered on January 12, 1978, is reported in 7 BRBS 608 (1978) and appears at Appendix C. p. A-19.

The Decision and Order of the Administrative Law Judge in the *Stewart* case, denying the benefits sought by the widow of the employee-claimant, and from which appeal was taken to the Benefits Review Board, was rendered on October 15, 1976, is reported in 5 BRBS 37 (ALJ) (1976), and appears at Appendix D, p. A-24. The Decision and Order of the Administrative Law Judge in the *Joyner* case, also denying the benefits sought by the employee-claimant, and from which appeal was taken to the Benefits Review Board, was rendered on September 30, 1976, is reported in 5 BRBS 42 (AL5) (1976) and appears at Appendix E, p. A-30.

In its Decisions and Orders of January 12, 1978, reversing the Administrative Law Judges in both the *Stewart* and *Joyner* cases, the Benefits Review Board remanded the cases to the respective Administrative Law Judges for a computation of benefits and an order directing payment of same. See Appendix F. p. A-36 for *Stewart* and Appendix G. p. A-40 for *Joyner*. Upon subsequent entry of the payment orders, the petitioners herein initiated appeals to the United States Court of Appeals for the Fourth Circuit. These appeals were later dismissed without prejudice, as being premature. Concurrently, with the aforesaid appeals to the Fourth Circuit, the petitioners herein made protective appeals back to the Benefits Review Board. On July 24, 1978, the Benefits Review Board rendered decisions and orders in both the *Stewart* and *Joyner* cases affirming the Administrative Law Judges' compensation orders and reaffirming its prior decision on the substantive jurisdictional issue. See Appendix H, p. A-45 for *Stewart* and Appendix I. p. A-50 for *Joyner*.

* The Benefits Review Board Service (BRBS) is the unofficial reporter of the Board's decisions.

JURISDICTION

The opinion and judgment of the U.S. Court of Appeals for the Fourth Circuit were filed and entered on October 26, 1979. See Appendix A, p. A1. This petition for certiorari was filed less than ninety days from the aforesaid date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. DID CONGRESS INTEND THAT EMPLOYEES OF A CONSTRUCTION COMPANY, ENGAGED IN CONSTRUCTION OCCUPATIONS, WOULD BE CONSIDERED "ENGAGED IN MARITIME EMPLOYMENT" AS THAT CLAUSE IS USED IN THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT?
2. DID CONGRESS INTEND THAT LAND BASED CONSTRUCTION PROJECTS ARE TO BE CONSIDERED PART OF "THE NAVIGABLE WATERS OF THE UNITED STATES" AS THAT CLAUSE HAS BEEN GIVEN EXPANDED MEANING IN THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT?

3. WAS CONSTRUCTION EMPLOYEE ARTHUR E. JOYNER ENGAGED IN "MARITIME EMPLOYMENT" AND INJURED UPON THE "NAVIGABLE WATERS OF THE UNITED STATES" FOR PURPOSES OF COVERAGE UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT WHEN, AS AN EXCAVATION FOREMAN ASSIGNED TO SUPERVISE THE OPERATION OF HEAVY EARTH MOVING EQUIPMENT, HE WAS STRUCK AND KILLED ON DRY LAND BY PIECE OF HEAVY EARTH MOVING EQUIPMENT DURING A GRADING AND FILLING OPERATION ON THE JOB SITE.

4. WAS CONSTRUCTION EMPLOYEE BENJAMIN F. STEWART ENGAGED IN "MARITIME EMPLOYMENT" AND INJURED UPON THE "NAVIGABLE WATERS OF THE UNITED STATES" FOR PURPOSES OF COVERAGE UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT WHEN, AS A PAINTER AND SANDBLASTER, HE WAS INJURED ON DRY LAND WHILE LOADING OR UNLOADING EQUIPMENT FROM A TRUCK.

STATUTORY PROVISIONS

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AS AMENDED 1972, 33 U.S.C. §902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder and shipbreaker, but such terms do not include a master or member of a crew or any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AS AMENDED 1972, 33 U.S.C. §903(a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel).

STATEMENT OF THE CASE

The jurisdiction of the United States Court of Appeals was invoked under Section 921(c) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq* (as amended 1972) to detemine the question of employee coverage under the jurisdictional provisions of the Act.

Many of the threshold factual matters attendant to claims under the Longshoremen's and Harbor Workers' Compensation Act, were stipulated by the parties in both cases. These matters include the employer-employee relationship, injury in the course of employment and other matters summarized with regard to Stewart and Joyner in the Administrative Law Judge opinions in their respective cases. Appendix D, at p. A-25 for *Stewart* and Appendix E, at p. A-31 for *Joyner.*

Factual matters which relate to the jurisdictional prerequisites of the Longshoremen's and Harbor Workers' Compensation Act were offered into evidence with little dispute, and have been stated in large part as Findings of Fact by the Administrative Law Judges. Appendix D, at p. A-25 for *Stewart* and Appendix E, at p. A-32 for *Joyner.*

Petitioner Brown & Root, Inc., the employer in both cases, was and is a corporation engaged in diverse

enterprises, each conducted by a separate division headed by a Senior Vice-President. The operating divisions of Brown & Root include the power plant division, mining division, marine division, industrial-civil division, oil field division and heavy domestic-overseas division. The North Yard construction project, from which the instant claims arose, was conducted entirely by the heavy domestic-overseas division. This division deals exclusively in large scale contract construction projects, both in the United States and in foreign countries.

Petitioner Travelers Insurance Company was the workmen's compensation insurance carrier for Brown & Root, Inc. at and for the North Yard construction project.

In early 1972, the Newport News Shipbuilding and Drydock Corporation (hereinafter, Newport News Shipbuilding) contracted with Brown & Root as general construction contractor, to construct an entirely new shipbuilding facility. This new shipyard was to be located contiguous with its then existing facility, but to the north, and was to be called the North Yard.

The North Yard was to contain a five story administration building, a sub-assembly and steel fabrication building for the assembly line production of component parts, a drydock (graving dock) and various craneways, assembly areas, parking areas, and related structures and improvements.

The area to the north of the then existing facilities of Newport News Shipbuilding was a shallow, but navigable part of the James River. Brown & Root, Inc., through its subcontractors, initiated construction by building bulkheads, one extending northward from the Newport News Shipbuilding facility and the other extending westward from a point on the eastern shore of the James River above the existing facility. The bulkheads joined to enclose a substantial area which, during and after completion of the bulkheads,

was filled to create the land area that was to become the North Yard. The fill consisted of earthen material brought to the construction site by truck and sand which was brought to the construction site by barge, pumped into the fill area with water, and allowed to settle.

Benjamin F. Stewart was injured on March 1, 1976 after several months of employment with Brown & Root, Inc. at the North Yard project. At the time of his injury, the project was sixty percent complete, with all fill work having been completed. After initial employment as a laborer, Stewart assumed the duties of a painter-sandblaster. As such, he worked out of a temporary construction building called the paint shed. Stewart testified that his duties required work in all areas of the project, including painting in new buildings, sandblasting in the as yet incomplete drydock and sandblasting and painting various materials in the paint shed. The paint shed was moved several times to accommodate construction needs. At the Administrative Law Judge hearing, Stewart testified that he suffered his back injury while loading a generator or sand bags on a truck located at the paint shed. At that time, the paint shed was located some 100 feet from the waters edge and adjacent to the sub-assembly and steel production building. He asserted that he had intended to take the generator or sand bags to the area of the then unfinished drydock.

Arthur E. Joyner suffered his fatal injuries on May 14, 1975, during the performance of his duties as an excavation foreman at the North Yard construction site. The stipulated facts were that, on the day of his injury, Joyner was directing the operation of earth moving equipment which in turn was engaged in grading and filling work at the construction site. During the course of his duties, a huge self-loading earth mover became stuck in an area where fill material had been previously deposited. Efforts were made to free the earth mover using bulldozers. During the process, Joyner was

apparently struck and killed by the earth mover. There were no eye witnesses.

The construction site on which Stewart and Joyner were injured was maintained separate and distinct from the then existing facilities of Newport News Shipbuilding. An eight foot chainlink security fence separated the construction site from the existing shipbuilding facility. The fence ran along the northern boundary of the existing facility, segregating it from the construction site. The sole provision for crossing the fence was a gate that was guarded by security personnel. To provide access to the site for construction workers and suppliers, Brown & Root, Inc. built a separate access road. At the time Stewart and Joyner suffered their injuries, there was no shipbuilding activity at the North Yard site. Some time thereafter, upon substantial completion of the North Yard project, Newport News Shipbuilding employees took control of completed facilities and began shipbuilding work. The North Yard was intended by Newport News Shipbuilding to expand its commercial shipbuilding capacity, particularly for liquified natural gas vessels, and has been so used since the completion of construction. Brown & Root, Inc. had no corporate relationship with Newport News Shipbuilding and Drydock Corporation, beyond the construction contract for the North Yard.

Initially, Stewart and Mary E. Joyner, widow of Arthur E. Joyner, were paid workmen's compensation benefits under the Virginia workmen's compensation statutes. Their claims for Longshoremen's and Harbor Workers' Compensation Act benefits were denied by the Administrative Law Judges hearing the matter initially. Both judges concluded that the employees were construction workers injured on a construction job site and were neither engaged in "maritime employment" nor injured on the "navigable waters of the United States" as those requirements appear in the 1972 Longshoremen's and Harbor Workers' Compensation Act.

The Benefits Review Board reversed the Administrative Law Judges in both cases, and remanded the cases for entry of compensation awards. See Appendix B & C. Compensation Orders were entered with credits for amounts paid under the Virginia statutes and compensation has since been paid, through the pendency of all proceedings, under the Longshoremen's and Harbor Workers' Compensation Act.

After a second appeal to the Benefits Review Board, the petitioners herein entered an appeal to the United States Court of Appeals for the Fourth Circuit. During the pendency of that appeal, counsel for Mary E. Joyner withdrew and she has not since appeared by counsel or otherwise during these proceedings. The Fourth Circuit, exercising jurisdiction under 33 U.S.C. §921(c), consolidated the cases and affirmed the Benefits Review Board's finding of coverage.

REASONS FOR ALLOWANCE OF THE WRIT

1. THE DECISION OF THE FOURTH CIRCUIT IN THE INSTANT CASE IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE FIFTH AND NINTH CIRCUITS REGARDING THE INTERPRETATION OF THE "MARITIME EMPLOYMENT" REQUISITE OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

This case presents an important issue of federal statutory interpretation on which the United States Supreme Court has yet to pronounce and on which the Courts of Appeal are now in substantial conflict. The issue of coverage under the Longshoremen's and Harbor Workers' Compensation Act[1] as amended, affects not only the parties to this case, but also all industries, business enterprises and employers, their

---

[1] Hereinafter referred to as the "Act" or the "Longshoremen's Act."

employees, employee representatives, and insurers, who become involved with activities conducted at the water's edge. At present, there is no uniformity in the Courts of Appeal as to interpretation of the law, methods of application or results obtained.

The central issue in conflict is the employee coverage prerequisite of "maritime employment" as that term appears in Section 902(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. In order for an employee to qualify for coverage, a claimant must meet the statutory definition of "employee" which the Act defines as "any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations and any harbor worker including a ship repairman, shipbuilding and shipbreaker . . ."[2]

It is submitted that this Court's opinions in *Northeast Terminal Co., Inc.* v. *Caputo,* 432 U.S. 249, 97 S.Ct. 2348 (1977) and most recently in *P.C. Pfeiffer Co., Inc.* v. *Ford,* No. 78-425, decided November 27, 1979, 48 U.S.L.W. 4018 (1979), have substantially established the meaning of the term "maritime employment" for workers engaged in maritime cargo handling. Similarly, the Circuit Courts of Appeal have shown substantial uniformity in applying the term to shipyard workers and those engaged in the process of shipbuilding and ship repair. See e.g. *Newport News Shipbuilding & Drydock Co.* v. *Graham,* 573 F.2d 167 (4th Cir. 1978) cert. denied, 439 U.S. 979 (1978), *Alabama Dry Dock & Shipbuilding Co.* v. *Kininess,* 554 F.2d 179 (5th Cir. 1976), *cert. denied,* 434 U.S. 903 (1977), *Dravo Corp.* v. *Maxin,* 545 F.2d 374 (3rd Cir. 1976) *cert. denied,* 433 U.S. 908 (1977).

This Court has not, however, interpreted the maritime employment coverage prerequisite for workers engaged in those multitude of other activities which may occur by the

[2] 33 U.S.C. 902(3)

water's edge. Indeed, in *Northeast Marine Terminal Co., Inc.* v. *Caputo, supra,* this Court specifically declined to provide a definition for those other classes of employees:

> As the definition of employee makes clear, the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations. It is, however, unnecessary in this case to look beyond these two subcategories.
>
> This case also does not involve the question whether Congress excluded people who would have been covered before the amendments; that is, workers who are injured on navigable waters as previously defined. See *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (CA9) cert. denied, 429 U.S. 868, 97 S.Ct. 179 L.Ed. 2d 148 (1976). *Northeast Marine Terminal, Inc.* v. *Caputo, supra,* 97 S.Ct. at 2358 n.25.

Stewart and Joyner represent a class of employees who are not involved with the process of loading or unloading marine cargo, building, repair or breaking of ships or any other type of ship's service employment. Their occupations were those typical of land-based construction workers. Had they been employed in their ordinary occupations in the construction of an industrial facility not by the water's edge, it is doubtful that a question of "maritime employment" would or could have been conceived. Their employment in construction occupations has substantial similarity to that of the claimants in *Fusco* v. *Perini North River Assoc.,* 601 F.2d 659 (2nd Cir. 1979) petition for certiorari filed No. 79-759, November 14, 1979. Their employment occupations which do not involve cargo handling, shipbuilding or ship repair, place them, for purposes of statutory interpretation, with the claimants in *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (9th Cir. 1976), *cert. denied,* 429 U.S. 868, 97 S.Ct. 179 (1976), *Thibodaux* v. *Atlantic Richfield Co.,* 580 F.2d 841 (5th Cir. 1978), *cert. denied,*_____*U.S.*____, *99 S.Ct. 2820 (1979) and*

Jacksonville Shipyard, Inc. v. *Perdue, (Charles W. Skipper)*, 539 F.2d 533 (5th Cir. 1976).[3]

In dealing with the cases of *Stewart* and *Joyner*, the Fourth Circuit found that the "maritime employment" test was satisfied for both claimants. The Court did not derive its conclusion from the overall occupational duties of the claimant, nor from the circumstances of their injuries. Rather, it labored with the facts to define maritime employment in terms of a vague geographical proximity to a maritime situs. The definition was derived from pre-1972 case law, which case law addressed only situs as a jurisdictional requirement.

The usefulness of pre-1972 amendment case law in rendering an interpretation of the "maritime employment" requirement of the present Section 902(3) has been rejected by both the Fifth and Ninth Circuit Courts of Appeal.

In *Weyerhaeuser* v. *Gilmore, supra*, the Ninth Circuit emphasized a full appreciation for the historical context in which pre-1972 amendment case law wrestled with the water's edge approach of *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917) and the practical consideration of occupation founded in the "maritime but local" rule. The Court stated:

> The LHCA was first enacted in 1927 and it is of no help to recount, as does the Board's brief, the pre-1972 amendment decisions of the Supreme Court wrestling with the problem of finding admiralty jurisdiction to permit recovery by maritime workers for shore based injuries, or dealing with the complex problems created by the fictional "maritime but local" doctrine to adjust

[3] Certiorari was not sought in the case of Charles W. Skipper, No. 75-2833. Certiorari was sought in four of the five cases contained therein, certiorari was granted in three, and the decision vacated and remanded for consideration in light of *Northeast Marine Terminal Co., Inc.* v. *Caputo*. The Fifth Circuit reaffirmed its prior ruling *per curiam* 575 F.2d 79 (5th Cir. 1978). Subsequently, certiorari was granted in two cases which this court recently decided in *P.C. Pfeiffer Co., Inc.* v. *Ford, supra*.

> state compensation laws with the exclusive federal maritime jurisdiction. (citation omitted).
>
> *We relegate those decisions to limbo because it is obvious to us that the 1972 amendments radically changed the basis for an employee's entitlement to federal compensation.* Prior to the amendment, an employee was entitled to federal compensation if his injuries occurred on navigable waters and his employer had an employee (not necessarily the injured employee) engaged in maritime employment; however, since the amendment, an employee is entitled to federal compensation only if he is engaged in maritime employment and he is injured on navigable waters or an adjoining area customarily used for loading, unloading, repairing, or building a vessel. (Emphasis added). *Weyerhaeuser* v. *Gilmore, supra*, 528 F.2d at 960

Similarly, the Fifth Circuit in *Jacksonville Shipyards, Inc.* v. *Perdue*, has stated:

> However, judicial constructions of the pre-1972 Act were necessarily limited by the water's edge approach of that statute.[11] For this reason, these older cases simply do not speak to the issue of what land-based employment is sufficiently "maritime" to be covered by the Act.[12]
>
> [12]. . . These occasional pronouncements by the courts have, at best, only the most tenuous connection with the 1972 Amendments' extension of coverage to shoreside injuries. In comparison with the statutory language itself and the legislative history, the timeworn dicta which are urged upon us are entitled to little weight. . . *Jacksonville shipyards, Inc.* v. *Perdue, supra*, 539 F.2d at 539, n.12

Except for historical purposes, this Court did not reference its pre-1972 amendment precedent in support of its statutory interpretation in either *Northeast Marine Terminal Co.* v. *Caputo* or *P.C. Pfeiffer Co., Inc.* v. *Ford*. To the extent that the Fourth Circuit has used pre-1972 precedent as a basis for

its interpretation of §902(3) maritime employment, it has also misapplied these recent Supreme Court decisions.

A further conflict, both in principal and in application, is created by the Fourth Circuit's failure to provide any general guidelines for its statutory interpretation which would serve to determine the question of maritime employment for construction workers on other projects by the water's edge or for those other multitude of enterprises and employments which do not involve cargo handling, shipbuilding or ship repair.

The Ninth Circuit has proposed such a test in *Weyerhaeuser Co.* v. *Gilmore, supra,* stating its analysis of the principals which should guide the interpretation of maritime employment, under any given set of facts, and holding:

> The 1972 amended prerequisite of "maritime employment" is a clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee. In other words, the fixed federal compensation is provided in lieu of the uncertainty of a recovery by an injured ship worker for a maritime tort. The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of his employment, i.e. the perils of the sea and an unseaworthy vessel recognized under maritime laws. Accordingly, we believe that to be entitled to the benefits of LHCA, *an employee's employment must have a realistic relationship to the traditional work and duties of a ship's service employment.* Otherwise the clear and unambiguous congressional language of "maritime employment" is nullified and rendered to read "any employment".
>
> We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, *must have a realistically significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters,"* with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in §903. (citations omitted) (Emphasis added). *Weyerhaeuser* v. *Gilmore, supra* 528 F.2d at 961

The Fifth Circuit in *Jacksonville Shipyards, Inc.* v. *Perdue, supra,* has cited *Weyerhaeuser* v. *Gilmore, supra,* with favor. The Benefits Review Board, partially reversing itself in tempering its rejection of the *Weyerhaeuser* v. *Gilmore* test in its opinions in *Stewart* and *Joyner* (See Appendix B, p. A-13), has adopted a test for interpretation of the "maritime employment" of employees not engaged in cargo handling or shipbuilding:

> . . . we conclude that a claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3). *Sedmak* v. *Perini North River Assoc.*, 9 BRBS 378, 386 (1979)[4]

The Second Circuit in *Fusco* v. *Perini North River Assoc., supra,* in reversing the Benefits Review Board in *Sedmak* v. *Perini North River Assoc.*, 9 BRBS 378 (1979), has rejected the use of any test or guideline based on occupation, work duties or type of employment. Rather, the Second Circuit has held that "maritime employment" under Section 902(3) should be determined by geographical location of the employees performance of his principal duties.

The petitioners herein would submit that there is now a conflict among the Circuit Courts of Appeal, both as to the type of occupational test or guidelines and as to the use of any occupational criteria for determining the meaning of "maritime employment".

This Court has recognized that there is no statutory definition and no legislative history which adequately

---

[4] *Sedmak, supra* was one of four companion cases decided by the Benefits Review Board in the same opinion. Two cases were appealed to the Second Circuit *sub nom, Fusco* v. *Perini North Assoc., supra* and from the decision of the Second Circuit, a Petition for Certiorari was filed November 14, 1979, No. 79-759.

reveals Congress' intent in adding maritime employment as an affirmative requirement for coverage under the Act:

> We turn first to the question whether Caputo and Blundo satisfied the "status" test — that is, whether they were "engaged in maritime employment" and therefore "employees" at the time of their injuries.[24] The question is made difficult by the failure of Congress to define the relevant terms — "maritime employment", "longshoremen", "longshoring operations",[25] — in either the text of the act or its legislative history.[26] *Northeast Marine Terminal Co.* v. *Caputo, supra,* 97 S.Ct at 2358

The efforts of the Circuit Courts of Appeals, reflecting this lack of legislative guidance, have conflicted not only in reasoning and approach, but also, in results achieved. For employers of workers not engaged in cargo handling, shipbuilding or ship repair, but who find themselves engaged in enterprises by the water's edge, the opinions below give no guidelines or even trends by which to judge future application. A pondman injured while handling floating logs in a saltwater pond, is not engaged in maritime employment. *Weyerhaeuser Co.* v. *Gilmore, supra.* Construction workers engaged in building a sewage treatment plant are engaged in maritime employment. *Fusco* v. *Perini North River Assoc., supra.* An oil field construction worker who is drowned while being transported to an oil field accessible only by water is not engaged in maritime employment. *Thibodaux* v. *Atlantic Richfield Co., supra.* A shipyard employee injured while dismantling a steel building in an area formerly used as a shipyard, is not engaged in maritime employment. *Jacksonville Shipyards, Inc.* v. *Perdue (Charles W. Skipper), supra.* Construction workers engaged in building an entirely new shipyard, at a construction site where shipbuilding activity would take place only in the future, are engaged in maritime employment. *Brown & Root, Inc.,* v. *Joyner, supra.*

It is submitted that the conflicts now existing among four Circuit Courts of Appeal substantially affect the

threshold question of coverage of the Longshoremen's Act. It is respectfully submitted that review by this Court is required to bring uniformity to this important area.

2. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN REGARD TO THE INTERPRETATION OF THE SITUS REQUIREMENT FOR COVERAGE UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

This Court has found, both in *Northeast Marine Terminals Co.* v. *Caputo, supra* and in *P.C. Pfeiffer Co., Inc.* v. *Ford, supra,* that the Longshoremen's Act has a dual test for coverage. The companion to the "maritime employment" or status requirement previously mentioned is the situs requirement found in §903(a) of the Act. It mandates that compensation be payable only if the employee is injured "upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, buildingway, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)."[5]

The Fourth Circuit has concluded that both Stewart and Joyner met the situs test, even though (1) they were injured on dry land, (2) the area or locality of their labors was not then being used as a shipyard and would only be so used some time after the completion of their work, (3) the filled land on which they were performing their labors had ceased to be part of the navigable adjoining river, and (4) the drydock, one of many facets of the project, its floors, its walls, its apron, was not the place of injury for either claimant.

The conclusion reached by the Fourth Circuit is not arrived at through a process of statutory construction. To do so would require the Fourth Circuit to interpret the

---

[5] 33 U.S.C. §903(a)

parenthetical language added to Section 903(a) by the 1972 amendments. Rather, it relied on pre-1972 case law, interpreting the extent of federal admiralty jurisdiction, to conclude that situs under Section 903(a) will be found if (1) at some date the situs of the employee's injury will be used for cargo handling, shipbuilding or ship repair and/or (2) at some date prior to the employee's injury, the situs of his injury was navigable water or was used for cargo handling, shipbuilding, or ship repair.

The Fifth Circuit, in *Jacksonville Shipyards, Inc.* v. *Perdue (Charles W. Skipper), supra,* has addressed this question of statutory interpretation, in the context of strikingly similar facts, and has employed a method and approach and has produced a result in equally striking conflict with that of the Fourth Circuit.

The employee in *Jacksonville Shipyards, Inc.* v. *Perdue,* (Charles W. Skipper) was injured while dismantling a steel building on a site owned by his employer, located adjacent to a navigable river and formerly used for shipbuilding activities. The Fifth Circuit, noting that the facility had ceased to be used for shipbuilding or repair some one year prior to the accident, stated:

> Our interpretation of the new situs provision follows the same general lines as our construction of Section 902(3). Just as we choose to ignore the labels which an employer or a union has bestowed upon an employee, and instead rely upon the employee's work function at the time of the injury, likewise, we will look past an area's formal nomenclature and examine the facts to see if the situs is one "customarily used by an employer in loading, unloading, repairing or building a vessel." The clear statutory scheme is to cover employees who are injured while performing certain types of work in an area which is customarily used for such work. *Jacksonville Shipyards, Inc.* v. *Perdue, supra,* 539 F.2d at 541.

> As with the "maritime employment" test, we also interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury. *It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future.* (Emphasis added) *Jacksonville Shipyards, Inc.* v. *Perdue, supra,* 539 F.2d at 541.

As previously noted, the Fifth Circuit has rejected pre-1972 case law as a guideline for the interpretation of the coverage provisions of the amended Longshoremen's Act. The Fourth Circuit has used pre-1972 case law as the basis for its interpretation. The Circuit Courts squarely are in conflict.

The Fifth Circuit has interpreted the enumerated areas, (piers, wharfs, drydocks, terminals, buildingways, marine railways) and the "other adjoining areas customarily used by an employer in loading, unloading, repairing or building a vessel" to mean that the situs, regardless of nomenclature, must have some contemporaneous function which relates to the work of loading, unloading, building or repairing a vessel. The Fourth Circuit has ignored the function of the job site and has relied on a strained application of nomenclature, finding that a shipyard under construction, where shipbuilding activities would occur only in the future, is a "shipyard" under Section 903(a). The Circuits are in direct conflict as to their method of interpretation.

It is submitted that the conflicting statutory constructions of the situs requirement under the Longshoremen's Act raise substantial questions of future application for all workers and employers who might find themselves engaged in enterprises by the water's edge. It cannot now be determined whether the situs requirement will be judged in terms of function, nomenclature, amenability to historic admiralty jurisdiction, past condition or future possibility. Review by this Court is needed to bring uniformity and predictability to this aspect of the federal compensation scheme.

3. THE DECISION BELOW RAISES QUESTIONS OF STATUTORY INTERPRETATION ANALOGOUS TO THOSE PRESENTED IN A CASE IN WHICH A PETITION FOR WRIT OF CERTIORARI IS NOW PENDING WITH THIS COURT.

In *Fusco* v. *Perini North River Assoc., supra,* petition for writ of certiorari pending *sub nom., Perini North River Assoc.* v. *Fusco,* No. 79-759, the Second Circuit held that two construction workers engaged in construction of a substructure for a sewage disposal plant extending over navigable waters, were engaged in "maritime employment" solely by virtue of the finding that their principal duties were performed over navigable waters.

The Court in *Fusco* found that both construction workers were injured either by falling into a navigable river or by falling from or onto structures located in the river. Having found the situs requirement satisfied, the Second Circuit proceeded to reject the occupational test for "maritime employment" and concluded that the "maritime employment" requisite of Section 902(3) was intended to cover any person who "performed his principal duties upon navigable waters as that term was defined in §3(a) of the original 1927 LHWCA." The occupational test for "maritime employment" was, in effect, read out of the Act, at least for those employees injured on the water.[6]

The issues presented to this Court in the petition for certiorari filed on November 14, 1979 in *Perini North River Assoc.* v. *Fusco, supra,* are:

> 1. Whether the maritime employment requirement of Section 902(3) of the Act require an occupational test of status to determine whether construction workers are covered under the Act?
>
> 2. Whether all workers who could have been covered employees under the 1927 Act are automatically covered after the 1972 amendments to the Act, solely by virtue of their prior coverage?

[6] The Court did add a caveat in that an occupational or function test might be contemplated in the Act for employees injured on the water, but those principal duties were not performed over water. The Court thus attempted to avoid a collision with the Fifth Circuit in *Thibodaux* v. *Atlantic Richfield Co., supra.* See *Fusco* v. *Perini North River Assoc.,* 601 F.2 at 669.

As to the first of these issues, the Fourth Circuit's decision achieves the same result of eliminating the work function of the individual claimant as the determinative factor. Despite incidential language to the contrary, the Fourth Circuit in effect creates a geographical test for "maritime employment."[7]

As to the second issue raised in the *Perini North River Assoc.* v. *Fusco* petition for certiorari, the Fourth Circuit has based its conclusion both as to situs and status on pre-amendment case law. In method and result, the Fourth Circuit decided that those employees covered under the 1927 Act, and its interpretive cases, are "automatically" covered under the amended Act.:

> ". . . we are confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments." *Brown & Root, Inc.,* v. *Joyner, supra* 607 F.2d at 1090

While the petitioners herein would vigorously dispute the Fourth Circuit's application of its own pre-amendment case law to the facts herein, the result of the Fourth Circuit's decision is to take the "automatic" coverage determination espoused in *Perini North River Assoc.* v. *Fusco, supra,* move it landward, and further dispose of the job function test for maritime employment. It is submitted that any "automatic"

[7] The Fourth Circuit does attempt to distinguish its position by noting the obvious conflict between *Weyerhaeuser* v. *Gilmore, supra,* (Ninth Circuit) and *Fusco* v. *Perini North River Assoc., supra,* where the employee is injured on or over the water. See *Brown & Root, Inc.,* v. *Joyner, supra* 607 F.2d at 1090.

coverage determination based on geographical location of injury alone is contrary to this Court's decisions in both *Northeast Marine Terminal Co.* v. *Caputo, supra* and *P.C. Pfeiffer Co., Inc.* v. *Ford, supra.*

Interpretation and method of interpretation of "maritime employment" should be consistent in any context of employee work activity which might arise. It is respectfully submitted that review by this Court of both the Second and Fourth Circuits decisions is necessary.

4. THE DECISION BELOW PRESENTS IMPORTANT QUESTIONS OF STATUTORY CONSTRUCTION ON WHICH THIS COURT'S RULING WOULD AFFECT THE OUTCOME OF SUITS NOW PENDING IN THE COURTS BELOW

There are a number of cases presently pending before the Circuit Courts of Appeals which involve construction workers injured on construction sites located adjacent to navigable waters. In each of these cases, the central issue is the statutory interpretation of the coverage provisions of Sections 902(3) and 903(a) of the amended Longshoremen's Act. In each case, the Benefits Review Board opinion from which appeal is taken places either significant or controlling reliance on the Board's prior opinions in *Stewart* v. *Brown & Root, Inc., supra* (Appendix B) and *Joyner* v. *Brown & Root, Inc., supra* (Appendix C)[8] In hearing these cases, the Circuit Courts of Appeal will most certainly be forced to deal with the conflicting methods of interpretation of the Act, as well as the conflicting results now precedent among the Circuits.

Pending before the First Circuit is *Dantes* v. *Western Foundation Corp.*, 10 BRBS 541 (1979), appealed *sub nom.*

[8] The Benefits Review Board, prior to the Fourth Circuit's decision in *Brown & Root, Inc.* v. *Joyner, supra,* modified its rational, if not its result. See *Sedmak* v. *Perini North River Assoc., supra*

Western Foundation Corp v. *Dantes,* No. 79-1358. In *Dantes,* the claimant was a construction worker injured on a land-filled job site while employed by a contractor in the construction of a graving dock to be used in the future for launching Trident submarines. In *Crawford* v. *Trotti & Thomason, Inc.* 9 BRBS 685 (1979) appealed *sub nom. Trotti & Thomason, Inc.* v. *Crawford,* No. 79-1793, the Fifth Circuit will address the maritime employment question as to a construction worker injured while engaged in building a wharf, later to be used for loading and unloading ships. The Ninth Circuit has two similar cases presently pending. *Ramos* v. *Universal Dredging Corp.* 10 BRBS 368 (1979), appeal Nos. 79-7257, 79-7302 and 79-7285, concerns a construction worker engaged in constructing a seaward extension of an airport runway, who was denied coverage by the Benefits Review Board. In *Silva* v. *Massman Construction Co.,* 9 BRBS 932 (1979) appealed *sub nom. Massman Construction Co.* v. *Silva* Nos. 79-7093, 79-7094 and 79-7129, the coverage question must be decided for a construction worker injured while building a dock to be used for loading Navy submarines.

There are also numerous cases of a similar nature pending before the Benefits Review Board and the Administrative Law Judges.

It is respectfully submitted that by hearing the instant case, this Court could offer substantial guidance to the Circuit Courts and the tribunals below. In so doing, judicial economy would be served and uniformity and predicability would be brought to the law.

CONCLUSION

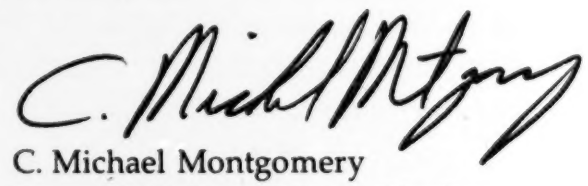
For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

C. Michael Montgomery
George M. Kelley III
Seawell, McCoy, Dalton, Hughes,
Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510
Telephone (804) 622-5341
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, C. Michael Montgomery, one of the attorneys for the petitioners in the above entitled proceeding, being a member of the bar of the Supreme Court of the United States, do hereby certify that on the 22 day of January, 1980, I served copies of the Petition for Writ of Certiorari, together with the Appendix attached thereto, by mailing copies thereof in duly addressed envelopes by air mail postage pre-paid to Mary M. Joyner VanderHeyden, *Pro Se* 3002 29th Street, Bay City, Texas 77414, to William J. Kilberg, Solicitor and Joshua T. Gillelan, II, Attorney, United States Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, Counsel for Director, Office of Workers' Compensation Programs, to the Benefits Review Board, U.S. Department of Labor, Washington, DC 20210, and to James R. Sheeran, Esquire, 2315 East Broad Street, Richmond, Virginia 23323, Counsel for Benjamin F. Stewart.



C. Michael Montgomery
Seawell, McCoy, Dalton, Hughes,
Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510
Telephone: (804) 622-5341
Attorneys for Petitioners

APPENDICES

APPENDIX A

BROWN & ROOT, INC. v. JOYNER
Cite as 607 F.2d 1087 (1979)

BROWN & ROOT, INC., Employer, and Travelers Insurance Company, Carrier, Petitioners,

v.

Mary M. JOYNER (Widow of Arthur E. Joyner), Claimant, and Benefits Review Board, United States Department of Labor, Respondents,

and

Director, Office of Workers' Compensation Programs, United States Department of Labor, Party-in-Interest.

BROWN & ROOT, INC., Employer, and Travelers Insurance Company, Carrier, Petitioners,

v.

Benjamin F. STEWART, Claimant, and Benefits Review Board, United States Department of Labor, Respondents,

and

Director, Office of Workers' Compensation Programs, United States Department of Labor, Party-in-Interest.

Nos. 78-1554, 78-1555.

United States Court of Appeals, Fourth Circuit.
Argued April 3, 1979.
Decided Oct. 26, 1979.

Employer appealed from orders of the Benefits Review Board which awarded benefits under the Longshoremen's

and Harbor Workers' Compensation Act. The Court of Appeals, Butzner, J., held that general excavation foreman who was killed, and painter sandblaster who was injured, while working on a dry dock construction project met the employment and situs tests for eligibility for benefits under the 1972 amendments to the Act.

Affirmed.

1. Workers' Compensation Key 260

Under the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, eligibility for benefits depends on the status of the employee and the situs of his injuries. Longshoremen's and Harbor Workers' Compensation Act, §1 et seq. as amended 33 U.S.C.A. §901 et. seq.

2. Workers' Compensation Key 260

General excavation foreman and painter sandblaster involved in the construction of a drydock were engaged in employment covered by the Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, §2(3) as amended 33 U.S.C.A. §902(3).

3. Workers' Compensation Key 260

Employment which has been held to be traditionally maritime is not stripped of its maritime character by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, §2(3) as amended 33 U.S.C.A. §902(3).

4. Workers' Compensation Key 260

General excavation foreman who was killed, and painter sandblaster who was injured, while working on a dry dock

construction project were working on the navigable waters of the United States at the time of the accidents and thus were covered by the Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, §3(a) as amended 33 U.S.C.A. §903(a).

George M. Kelley, III, Norfolk, Va. (C. Michael Montgomery, Harry E. McCoy, Seawell, McCoy, Dalton, Hughes, Gore & Timms, Norfolk, Va., on brief), for petitioners Brown & Root, Inc. and Travelers Ins. Co.

Joshua T. Gillelan, II, U.S. Dept. of Labor, Laurie M. Streeter, Associate Sol., Washington, D.C., on brief), for respondent Director, Office of Workers' Compensation Programs.

James R. Sheeran, Richmond, Va., for respondent Stewart.

Before BUTZNER, WIDENER and HALL, Circuit Judges.

BUTZNER, Circuit Judge:

Brown & Root, Inc., and its workers' compensation insurer, Travelers Insurance Company, appeal two final orders of the Benefits Review Board awarding benefits under the Longshoremen's and Harbor Workers' Compensation Act for injuries and death arising out of the construction of a shipyard and dry dock. The two proceedings were consolidated for our review. We affirm.

I

Newport News Shipbuilding and Drydock Corporation engaged Brown & Root as an independent contractor to construct a shipyard for building and servicing liquified natural gas vessels. The project consisted of an administration building, a sub-assembly and steel fabrication building for production of component parts, a permanent dry dock for building and repair of ships, and related structures such as crane-

APPENDIX A

ways and assembly areas. The new yard is built on land in an area that was formerly a shallow, navigable part of the James River. Brown & Root built a sea wall with bulkheads to enclose part of the river. Sand was then brought up river, pumped into the enclosure, and allowed to settle. The site of the dry dock was excavated to accommodate deep draft vessels. The new yard was separated from Newport's existing yard during construction. A fence surrounded the site, and a separate road provided access only for construction workers.

Arthur E. Joyner, general excavation foreman, was killed by a tractor while supervising the loading of sand at a reclaiming pit where it had settled after being pumped ashore. The sand was used to grade the yard and backfill the concrete walls of the incomplete dry dock. The reclaiming pit is now the location of the shipyard's steel fabrication building.

Stewart, a painter-sandblaster, worked all over the project. He injured his back within 100 feet of the water's edge while loading a generator and bags of sand into a truck for transport to the incomplete dry dock.

Stewart and Mary Joyner, widow of Arthur E. Joyner, initially were denied benefits by hearing examiners who concluded that neither employee was engaged in maritime employment on the navigable waters of the United States. The Benefits Review Board reversed both decisions. It held that the employees were harbor workers, an occupation which it defined as embracing "those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships) . . ."[1]

[1] *Stewart* v. *Brown & Root, Inc.*, 7 BRBS 356, 365 (1978); *Joyner* v. *Brown & Root, Inc.*, 7 BRBS 608, 611 (1978).

APPENDIX A

II

[1] Under the 1972 amendments to the Act, eligibility for benefits depends on the status of the employee and the situs of his injuries. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). Eligible employees are those "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker."[2] To be compensable, injuries to covered employees must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)."[3]

There can be no doubt that Brown & Root was an employer as defined by 33 U.S.C. §902(4).[4] It has a marine division whose employees worked on navigable waters. But the business of the employer, which was critical before adoption of the 1972 amendments, is no longer controlling. Because Congress extended coverage shoreward in 1972, the covered employees of a statutory employer must be "engaged in maritime employment." See *Caputo*, 432 U.S. at 264, 97 S.Ct. 2348.

[2] Stewart and Joyner were both engaged in building a dry dock. We have held, under the earlier version of the Act,

[2] 33 U.S.C. §902(3).

[3] 33 U.S.C. §903(a).

[4] 33 U.S.C. §902(4) provides: "The term 'employer' means an employer any of whose employees are employed in maritime employment . . ."

that employees building and repairing dry docks are engaged in maritime employment. *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne,* 192 F.2d 968 (4th Cir. 1951); *Travelers Insurance Co.* v. *McManigal,* 139 F.2d 949 (4th Cir., 1944); *Travelers Insurance Co.* v. *Branham,* 136 F.2d 873 (4th Cir. 1943). We did not base coverage on the simple proposition that the employers were engaged in maritime commerce. Instead, we examined the work of the individual claimants and concluded that it was maritime employment. In reaching this decision, we emphasized that a dry dock is peculiarly a maritime facility.

[3] Brown & Root argue that decisions interpreting the Act before it was amended have lost their precedential value. We cannot accept this broad proposition. Opinions differ over whether Congress intended the 1972 amendments to exclude employees of maritime businesses who would have been covered before 1972 because their injuries occurred on navigable waters regardless of the nature of their work. Compare *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (9th Cir. 1976) (excluded) with *Fusco* v. *Perini North River Associates,* 601 F.2d 659 (2d Cir. 1979) (included). The Supreme Court found no occasion to decide this question when dealing with longshoremen who traditionally have been considered to be engaged in maritime employment. See *Caputo,* 432 U.S. at 265 n.25, 97 S.Ct. 2348. We, too, find it unnecessary to reach this issue, for we are confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments.

Therefore we conclude that both Stewart and Joyner satisfy the status test because they were engaged in maritime employment while they worked to construct the dry dock.[5]

---

[5] The Benefits Review Board's definition of "harbor workers," *see* text at note 1, *supra,* includes persons who are constructing dry docks. We need not determine whether this definition conforms to congressional intent in every aspect of a harbor worker's employment. It is enough for us to note that in this instance the Board's definition is apt.

III

[4] The Board also correctly ruled that the claimants satisfied the situs test. Both Stewart and Joyner worked on various projects on the shipyard construction site after the water was pumped out and retained by bulkheads. Previously we have held that the site of a dry dock, which was formerly navigable water and would be used against in support of navigation, remained a part of the navigable waters of the United States during construction of the dock. See *Travelers Insurance Co.* v. *McManigal,* 139 F.2d 949, 952 (4th Cir. 1944). Our opinion was premised in part on the concept, expressed in *The Raithmoor,* 241 U.S. 166, 175, 36 S.Ct. 514, 60 L.Ed. 937 (1916), that an aid to navigation, though under construction, is of sufficient maritime import to sustain admiralty jurisdiction. Consequently, the dry dock, though under construction, was considered a part of the navigable waters of the United States even before the amendment to 33 U.S.C. §903(a). The 1972 amendment did not change this interpretation of the Act. Additionally, the amendment establishes that the shipyard adjacent to the dry dock is also part of the navigable waters. Because Stewart was injured and Joyner killed while working within this area, their compensation claims satisfy the Act's situs criteria. Congress intended to avoid a fortuitous distinction in coverage based on whether injury occurred in the dry dock or in the shipyard adjacent to it. See S.Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972).

The Board's awards are affirmed.

APPENDIX B

FILED AS PART OF THE RECORD — JANUARY 12, 1978;
Lelia L. Williams, Asssistant Clerk, Benefits Review Board
U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

BENJAMIN F. STEWART
Claimant-Petitioner

v.

BROWN & ROOT, INC. BRB No. 76-451

and DECISION

TRAVELERS INSURANCE COMPANY
Employer/Carrier-
Respondents

Appeal from the Decision and Order of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

James R. Sheeran, Richmond, Virginia, for the claimant.

George M. Kelley III (Seawell, McCoy, Dalton, Hughes, Gore & Timms), Norfolk, Virginia, for the employer/carrier.

Before: SMITH, Chairman and MILLER, Member.

MILLER, Member:

This is an appeal by the claimant from a Decision and Order (76-LHCA-762) of Administrative Law Judge Edward

APPENDIX B

C. Burch pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereafter referred to as the Act).

Claimant Benjamin F. Stewart is approximately 42 years old, has an eighth grade education, and has done manual labor all his life. He injured his back in the course of his employment for Brown & Root, Inc. on March 1, 1976. The injury occurred on the site of Newport News Shipbuilding & Drydock Company's (NNS&D's) "North Yard Project". Employer Brown & Root had a contract with NNS&D for construction work, the purpose of which was to expand NNS&D's shipyard. NNS&D is a shipbuilding company. Employer Brown & Root is a construction company based in Houston, Texas. Brown & Root has several "Divisions", including a Marine Division. Its Overseas Domestic Division was responsible for the North Yard Project.

Claimant was employed by Brown & Root to work on the North Yard Project as a painter-sandblaster. He injured his back at a location about 100 feet from the water's edge and a partially constructed graving dock while "loading a generator onto a truck for immediate transport into the graving dock itself". Claimant's injury was diagnosed as ruptured discs. He was hospitalized for approximately two weeks as a result of the injury. In addition to his claim for back injury, claimant has alleged lung impairment related to his sandblasting work.

Prior to the commencement of Brown & Root's landfilling and construction work, the North Yard Project site was navigable water. The project was about 60% completed at the date of claimant's injury. Claimant's duties required him to work all over the project site, including sandblasting work in the drydock (graving dock) itself.

A hearing was held in Norfolk, Virginia before Administrative Law Judge Edward C. Burch on July 29, 1976. At that

hearing the parties stipulated (1) that claimant injured his back in the course of his employment for Brown & Root on March 1, 1976; (2) that all notice and filing requirements related to the back injury had been met; (3) that claimant's average weekly wage at the date of injury was $304.00; and (4) that claimant began receiving benefits under Virginia's Workmen's Compensation law on March 10, 1976, and payments of $149.00 per week were continuing to be made at the date of the hearing. Judge Burch issued a Decision and Order on September 30, 1976, in which he denied benefits under the Act. He found that claimant failed to meet the "status" and "situs" requirements of the Act, 33 U.S.C. §902(3) and 903(a). Claimant petitioned for review and oral arguments were held before the Board at Norfolk, Virginia on April 26, 1977.

Since the formal hearing in this case the United States Supreme Court has issued a major decision construing Sections 2(3) and 3(a) of the Act. *Northeast Marine Terminal Co., Inc.* v. *Caputo*, ___ U.S. ___, 97 S.Ct. 2348 (1977), (hereafter referred to as *Caputo/Blundo*). A question which the Supreme Court said was "not involved" in *Caputo/Blundo* was whether, by the 1972 amendments, "Congress excluded people who would have been covered before the amendments; that is, workers who are injured on navigable waters as previously defined". *Id.* at 2358 n. 25. This issue — whether under the amended Act, some formerly covered employees would fail the new "status" test — is important to the treatment of the case before the Board because the decisions most strangly supporting claimant's argument for coverage under the Act were issued prior to 1972. The administrative law judge found those cases to "carry little weight because decided prior to the 1972 amendments to the Act." Decision and Order at 4. Although this question was not resolved in *Caputo/Blundo* because it was not an issue in the cases at bar, the Court did quote from portions of the legislative history

that address the issue. The Court cited the Section 2(3) Section-by-Section Analysis in the Senate Report which stated: "The definition . . . does *not* exclude other employees traditionally covered . . .". *Id.* at 2358 n. 26 (emphasis added).

Other language in the decision also provides support for continued consideration of pre-amendment case law. Looking deeper into the "status" issue, the Court said "[t]he language of the Amendments is broad and suggests that we should take an expansive view of the extended coverage. Indeed, such a construction is appropriate for this remedial legislation." *Id.* at 2359. And a more general statement of Congressional intent was cited in the opening lines of the decision. "In 1972 Congress amended the . . . Act . . . in substantial part to '*extend* [the Act's] coverage to protect *additional* workers.' S. Rep.No. 92-1125, 92d Cong, 2d Sess, 1 (1972)." *Id.* at 2351 (emphasis added).

There is yet another reason not to ignore pre-1972 cases. Although employer asserts that the cases are no longer authoritative for determining "covered employees" under the Act because the amendments added a brand new "status" test, it must be noted that the new test is based on the meaning of "maritime employment", a term which has existed in the statute from its inception. The term was originally part of the definition of "employer", and satisfaction of that definition was the source of substantial litigation on the issue of the jurisdiction of the Act. There is no evidence in the statute or the legislative history to indicate that Congress intended the term "maritime employment" to have a more restrictive meaning in the amended section on "employees" than it had in the unamended section on "employers". Hence, reference to prior judicial construction of the phrase is entirely appropriate in post-amendment cases.

APPENDIX B

Employer's intepretation of the "status" test, as adopted by the administrative law judge, is also less tenable now than at the time of the formal hearing because the decision in the major Fourth Circuit case relied on by employer was recently vacated and remanded by the Supreme Court for further consideration in light of *Caputo/Blundo. I.T.O. Corp of Baltimore* v. *Benefits Review Board,* 529 F.2d 1080 (4th Cir. 1975); *modified en banc,* 542 F.2d 903 (4th Cir. 1976); *vacated and remanded, sub nom., Adkins* v. *I.T.O. Corp. of Baltimore,* 97 S.Ct. 2967 (1977). In the I.T.O. case, the Fourth Circuit tried to establish its "point of rest" theory for determining "covered employees". But the Supreme Court in *Caputo/Blundo* said, "[a] theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage is incapable of defeating our conclusion that Blundo and Caputo are 'employees' ". *Caputo/Blundo* at 2365. That statement by the Court repudiates not only the language in the *I.T.O.* case pertaining to the point of rest theory itself, but also the Fourth Circuit's idea that the "net effect of the 1972 Amendments was . . . to *narrow* the class of persons eligible according to job function". *I.T.O.* 529 F.2d 1083. On reconsideration the Fourth Circuit reversed its original decision and found the claimant to be a covered employee. *I.T.O. Corp. of Baltimore* v. *Benefits Review Board,* No. 75-1051, Sept. 22, 1977.

In light of (1) the existence of the term "maritime employment" in the Act prior to the 1972 amendments; (2) the legislative history; and (3) the interpretation given to Sections 2(3) and 3(a) by the Supreme Court in *Caputo/Blundo,* the Board concludes that it was not the intention of the 1972 amendments to exclude any formerly covered employees. The Board also finds that pre-1972 cases retain

APPENDIX B

their persuasiveness for determining which employees come within Section 2(3) of the Act[1].

A series of cases from the Fourth Circuit have found employees to be covered under the Act where they were doing work similar to that done by claimant Stewart. *Travelers Insurance Co.* v. *Branham,* 136 F.2d 873 (4th Cir. 1943). *Travelers Insurance Co.* v. *McManigal,* 139 F.2d 949 (4th Cir. 1944). *Newport News Shipbuilding & Drydock Co.* v. *O'Hearne,* 192 F.2d 968 (4th Cir. 1951). The employees in those cases were engaged in repair or construction of drydocks. The court in *Branham* found that "a general labor foreman engaged in the construction of a drydock . . . [was] engaged

---

1 The Board does not follow the Ninth Circuit's decision to "relegate those decisions to limbo". *Weyerhauser Co.* v. *Gilmore,* 528 F.2d 957 (9th Cir. 1976), *cert. denied* 429 U.S. 868, 97 S.Ct. 179 (1976). The Section 2(3) principles, cited above, which the Supreme Court developed in *Caputo/Blundo,* undermine the Ninth Circuit's criteria for coverage under Section 2(3) — that an employee's work "have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' . . . [and specifically that] an employee's employment have a realistic relationship to the traditional work and duties of a ship's service employment". *Gilmore* at 961. Clearly, the *Caputo/Blundo* decision mandates a more expansive interpretation of Section 2(3). The *Gilmore* decision is even less reliable authority because the Ninth Circuit misapplied its own test of "maritime employment". An early decision by the United States Supreme Court had found workers in the state of Washington to be engaged in maritime employment (although of a local nature under the now defunct "maritime but local" test), where their duties were essentially identical to Gilmore's. *Sultan Ry. & Timber Co.* v. *Department of Labor and Industries of State of Washington,* 277 U.S. 135 (1928). Plaintiffs in *Sultan Ry.* were sawmill workers whose work consisted of guiding logs between various points on a river during the milling operation. Gilmore worked at a bayside location where he sorted logs and fed them into the mill for processing. Had the "maritime but local" test not existed, the plaintiffs in *Sultan Ry.* would have been considered simply "maritime employees". The Supreme Court eliminated the "maritime but local" doctrine and declared the Act applicable to *all* injuries sustained by employees on navigable waters in *Calbeck* v. *Travelers Insurance Co.,* 370 U.S. 114, 124 (1962). Hence, the Ninth Circuit should have found Gilmore to be a "maritime employee" under the *Sultan Ry.* decision.

The Board also declines to follow the Fifth Circuit case of *Jacksonville Shipyards, Inc.* v. *Skipper,* 539 F.2d 533 (5th Cir. 1976). There it was said that "pre-1972 decisions which discussed the meaning of the term 'maritime employment' as used in the former Act . . . were necessarily limited by the 'water's edge' approach of that statute. For this reason, these older cases simply do not speak to the issue of what land-based employment is sufficiently 'maritime' to be covered by the new Act". *Id.* at 539.

in a maritime operation and enterprise, and his employment was maritime". *Branham* at 874. A carpenter who was building a drydock ws found to be "engaged in a maritime employment" in *McManigal* at 952. And the Fourth Circuit concluded that a welder killed while repairing the gate of a graven dry dock was similarly covered under the Act. *O'Hearne* at 970.

The employees in *Branham, McManigal* and *O'Hearne* were in the drydocks (and therefore "on navigable waters") when then they had their accidents. Claimant Stewart was only near the drydock when he was injured, so he would not have been a "covered employee" under the old Act. For this reason, the principle that no formerly covered employees are to be excluded will not automatically bring this claimant under Section 2(3). However, the Board finds that he did meet the status requirement. We arrive at this conclusion by taking the Fourth Circuit's approach in favor of covering drydock construction workers, and adding to that the requirement that we follow Congress' expressed intention as adopted by the Supreme Court in *Caputo/Blundo.* By means of the 1972 amendments, Congress intended to create a " 'uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity'. S Rep, at 13; HR Rep, at 10-11. . . . The Act focuses primarily on occupations — longshoreman, harbor worker, ship repairman, ship builder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the amendments, would be covered only for part of their activity." *Caputo/Blundo* at 2361-62.

Claimant's sandblasting work required him to spend a good deal of time in the graving dock. Hence, he clearly would have been a "covered employee" according to the Fourth Circuit cases during those times. Applying the "continuous coverage" reasoning of Congress and the Supreme

Court, claimant should be covered by the Act for all of his work activity.

In reversing the decision below that claimant failed the "status" test, the Board is expressly rejecting the administrative law judge's interpretation of the term, "harbor worker". We agree, however, that "harbor worker" is the appropriate category of Section 2(3) under which to analyze claimant's work. As the Supreme Court noted in *Caputo/Blundo,* construing Section 2(3) "is made difficult by the failure of Congress to define the relevant terms . . .." *Id.* at 2358. In regard to "status", the administrative law judge cited a definition of "harbor workers" from Norris' treatise, *The Law of Maritime Personal Injuries,* §3 (3d ed. 1975). He relied on that part of the definition desccribing "harbor workers" as

> those who 'labor or provide services for the furtherment of ship's business' . . . [including] longshoremen (those who load and unload cargo), maintenance men (such as shipcleaners, tank cleaners, riggers, carpenters, electricians, painters, mechanics), cargo checkers, cargo weighers, cargo talleyers, ship ceilers, port watchmen and repairmen (welders, riveters, steam fitters, plumbers).

Decision and Order at 4. The administrative law judge found that since claimant did not fit within Norris' criteria he was not a "harbor worker". Turning to the Norris treatise for guidance, the administrative law judge did find the lengthiest discourse on "harbor workers". However, the Norris work is an inadequate source for intepreting that term as it is used in amended Section 2(3) of the Act. Norris says,

> "Harbor worker" is a rather unsatisfactory term to describe that large class of workers performing services aboard ship but who are not seamen on articles . . . The usual concept of a harbor worker is of one more or less regularly engaged in work on the waterfront . . . I would generically regard all who labor or provide services for the furtherment of ship's business (excluding, of course, members of the ship's company) as "harbor workers".

1 M.J. Norris, *The Law of Maritime Personal Injuries*, §3, at 6 (3d ed. 1975).

The treatise is inappropriate for our purposes because it fails to reflect even the enumerated Section 2(3) categories of "harbor workers". And it certainly does not follow the position taken by the Supreme Court in *Caputo/Blundo* that the wording of Section 2(3) is non-exclusive. Norris limits his definition to those "performing services aboard ship". This most obviously excludes shipbuilders whom Congress specifically included as an example of "harbor workers". Also, Norris considers "harbor worker" to be a broad category of which longshoremen and ship repairmen are sub-categories. On its face, Section 2(3)'s structure indicates that Congress saw longshoremen as a separate group of employees. Norris' chapter on "harbor workers" is primarily concerned with distinguishing those workers from "members of a crew" who are not covered under the Act. That distinction is also the major issue in all of the reported cases discussing the term "harbor worker". That issue is not involved here, so the cases are no more useful than Norris' treatise in helping us to determine whether claimant is a "harbor worker" under Section 2(3).

As the Board is asked increasingly to refine the scope of amended Sction 2(3), distinctions among the enumerated categories of employees will become more and more important. Uniform application of the law requires that there be standard definitions of the relevant terms of the Act. Accordingly, the Board proposes a definition of the term "harbor worker" which we feel reflects the intention of Congress and the "liberal construction" rule mandated by the Supreme Court — most recently in the *Caputo/Blundo* decision (at 2359). For future application of the "status" test, at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading,

unloading, repair or construction of ships) will be deemed "harbor workers" within the meaning of Section 2(3) of the Act.

The Board finds that claimant Stewart was, at the time of his injury, a "harbor worker". He was an "employee" covered under Section 2(3) of the Act.

The administrative law judge also found that claimant failed the "situs" test of Section 3(a) of the Act. The cases in claimant's favor on this issue are the same series of Fourth Circuit decisions used to support claimant's "status" argument. Their persuasiveness in regard to "situs" was rejected for the same reason as for "status" — because they were decided prior to the 1972 amendments. We have already shown that there is no justification for disregarding these early cases.

At the time of his injury, claimant was in an area which, upon completion of construction, would qualify under Section 3(a) as an "adjoining area customarily used by an employer in . . . building a vessel". The *O'Hearne, McManigal* and *Branham* cases held that where an employee was upon an otherwise covered "situs", the fact that the situs was under construction would not preclude coverage under the Act. That reasoning is equally applicable here. The incomplete state of the North Yard Project will not prevent claimant from passing the "situs" test.

The Board finds that claimant has met the coverage requirements of Sections 2(3) and 3(a) of the Act. The administrative law judge's conclusions of law to the contrary were in error.

APPENDIX B

Accordingly, the Decision and Order of the administrative law judge is reversed and the case is remanded for determination of compensation and other beneifts due to claimant under the Act.

/s/ Julius Miller
Member

I Concur:

/s/ Samuel J. Smith
Chairman

Dated this 12th day
of January, 1978

SERVICE SHEET

BRB No. 76-451: *BENJAMIN F. STEWART* v. *BROWN & ROOT, INC. AND TRAVELERS INSURANCE COMPANY* (Case No. 76-LHCA-762) (OWCP No. 5-12902)

A copy of this Decision was sent to the following parties:

James R. Sheeran, Esq. — Certified
2315 East Broad Street
Richmond, Virginia 23223

George M. Kelley, III, Esq. — Certified
936 Wainwright Building
Duke & Bute Streets
Norfolk, Virginia 23510

Miss Laurie M. Streeter
Associate Solicitor
U.S. Department of Labor
Suite N-2716, NDOL
Washington, D.C. 20210

Judge Edward C. Burch
U.S. Department of Labor
Vanguard Building, Suite 720
Washington, D.C. 20036

Mr. Jerry C. Oosting
US DOL/ESA/OWCP
3661 Virginia Beach
Blvd. East, Room 101
Norfolk, Virginia 23502

Mr. Everett P. Jennings
Acting Director, Office of Workers' Compensation Programs
U.S. Department of Labor
Suite S-3524, NDOL
Washington, D.C. 20210

APPENDIX C

FILED AS PART OF THE RECORD — JANUARY 12, 1978;
Lelia L. Williams, Asssistant Clerk, Benefits Review Board
U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

MARY M. JOYNER
(WIDOW OF ARTHUR E. JOYNER)
Claimant-Petitioner

v.

BROWN & ROOT, INC. — BRB Nos. 76-471 & 76-471A

and — DECISION

TRAVELERS INSURANCE
COMPANY
Employer/Carrier-Respondents

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION
PROGRAMS, UNITED STATES
DEPARTMENT
OF LABOR

Petitioner

Appeals from the Decision and Order of Freeman Murray, Administrative Law Judge, United States Department of Labor.

Robert A. Farris, Jr. (Farris, Thomas and Farris), Wilson, North Carolina, for the claimant.

APPENDIX C

Linda L. Carroll (Carin Ann Clauss, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

George M. Kelley III (Seawell, McCoy, Dalton, Hughes, Gore & Timms), Norfolk, Virginia, for the employer/carrier.

Before: SMITH, Chairman and MILLER, Member.

SMITH, Chairman:

These are appeals by the claimant and the Director, Office of Workers' Compensation Programs, United States Department of Labor from a Decision and Order (76-LHCA-654) of Administrative Law Judge Freeman Murray pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

Claimant Mary M. Joyner is the widow of Arthur E. Joyner who was killed in the course of his employment for Brown & Root, Inc. on May 14, 1975. The death occurred on the site of Newport News Shipbuilding and Drydock Company's (NNS&D's) "North Yard Project". Employer Brown & Root had a contract with NNS&D for construction work, the purpose of which was to expand NNS&D's shipyard. NNS&D is a shipbuilding company. Employer Brown & Root is a construction company based in Houston, Texas. Brown & Root has several "Divisions", including a Marine Division. Its Overseas Domestic Division was responsible for the North Yard Project.

Decedent Joyner was working on the North Yard Project as General Foreman in the excavation department of Brown & Root's Overseas Domestic Division. He was killed after being struck by a 'pan' (a type of earth moving tractor) which was being used to dislodge another pan that was stuck

APPENDIX C

in soft sand. The accident occurred in an area designated as a "reclaiming pit" or "settling pond". The area was near a partially constructed graving dock. Before the construction project began the area had been "part of the river". Brown & Root was in the process of filling in the water area with sand. At the time of the accident there was "a long way to go" toward completion of the graving dock. Pilings had been placed, but the walls were not closed in. Decedent was standing in the recently filled "settling pond" location, directing the movement of the pans when he was killed. The filling procedure entailed bringing sand to the North Yard via barge. The barges came up the James River, moored offshore, and "a line would be run ashore. Water would be added to the sand . . . [and] it would be pumped ashore into a settling area, so that the sand would settle, that the water would run off. Then earth moving equipment could move the sand . . . [T]he earth moving equipment and job came under the Excavation Department, of which Mr. Joyner was the general foreman".

A hearing was held in Raleigh, North Carolina, before Administrative Law Judge Freeman Murray on June 23, 1976. At that hearing the parties stipulated (1) that Brown & Root and decedent had an employer/employee relationship on May 14, 1975; (2) that decedent was fatally injured on that date; (3) that decedent's average weekly wage on that date was $391.23; (4) that claimant's dependency on decedent is not an issue; and (5) that claimant was paid $800 by employer/carrier as a burial allowance under the Virginia State Compensation Act. Judge Murray issued a Decision and Order on October 15, 1976, in which he denied benefits under the Act. He found that decedent failed to meet the "status" and "situs" requirements of the Act, 33 U.S.C. §902(3) and §903(a). Based upon our recent decision in *Stewart* v. *Brown & Root, Inc.*, BRBS , BRB No. 76-451 (January 1978), the Board finds that these conclusions of law were in error.

APPENDIX C

The administrative law judge declined to follow the Fourth Circuit cases relied on by claimant on the ground that "prior to the 1972 Amendments . . . the Act did not contemplate the 'status' test." Decision and Order at 5. For the same reasons as those stated in our *Stewart* decision we find that the pre-1972 cases retain their persuasiveness for determining which employees come within Section 2(3) of the Act. In one of those Fourth Circuit cases, the claimant's work was virtually identical to employee Joyner's duties. The court found that "a general foreman engaged in the construction of a drydock . . . [was] engaged in a maritime operation and enterprise, and his employment was maritime." *Travelers Ins. Co.* v. *Branham,* 136 F.2d 873, 874 (4th Cir. 1943).

On the "status" issue, the Board finds specifically that employee Joyner was, at the time of his death, a "harbor worker" as that term was defined in our *Stewart* decision. He was, therefore, an employee covered under Section 2(3) of the Act.

The *Stewart* case is also controlling in regard to "situs". Hence, the Board finds that employee Joyner met the coverage requirements of Sections 2(3) and 3(a) of the Act.

Accordingly, the Decision and Order of the administrative law judge is reversed and the case is remanded for determination of benefits due to claimant under the Act.

/s/ Samuel J. Smith,
Chairman

I Concur:

/s/ Julius Miller,
Member

Dated this 12th day
of January, 1978

APPENDIX C

SERVICE SHEET

BRB No. 76-471 &
76-471A: *MARY M. JOYNER (WIDOW OF ARTHUR E. JOYNER)* v. *BROWN & ROOT, INC. AND TRAVELERS INSURANCE COMPANY* (Case No. 76-LHCA-654) (OWCP No. 5-11972)

A copy of this Decision was sent to the following parties:

Robert A. Farris, Jr., Esq. — Certified
303 East Nash Street
P.O. Box 817
Wilson, North Carolina 27893

Harry E. McCoy, Esq. — Certified
936 Wainwright Building
Norfolk, Virginia 23510

Linda L. Carroll, Esq. — Certified
U.S. Department of Labor
Suite N-2716, NDOL
Washington, D.C. 20210

Miss Laurie M. Streeter
Associate Solicitor
U.S. Department of Labor
Suite N-2716, NDOL
Washington, D.C. 20210

Mr. Jerry C. Oosting
US DOL/ESA/OWCP
3661 Virginia Beach
Blvd. East, Room 101
Norfolk, Virginia 23502

Judge Freeman C. Murray
U.S. Department of Labor
Vanguard Building, Suite 720
Washington, D.C. 20036

Mr. Everett P. Jennings
Acting Director, Office of Workers' Compensation Programs
U.S. Department of Labor
Suite S-3524, NDOL
Washington, D.C. 20210

APPENDIX D

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

IN THE MATTER OF

BENJAMIN F. STEWART
Claimant

v.

BROWN AND ROOT, INC.
Employer

Case No. 76-LHCA-762

OWCP No. 5-12902

and

THE TRAVELERS INSURANCE COMPANY
Carrier

James R. Sheeran, Esquire
Main Street
Box 209
West Point, Virginia 23181
For the Claimant

George M. Kelley, III, Esquire
936 Wainwright Building
Duke and Bute Streets
Norfolk, Virginia 23510
For the Employer

BEFORE: EDWARD C. BURCH
Administrative Law Judge

APPENDIX D
DECISION AND ORDER
Issue and Conclusion

Was Claimant, in this action brought under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (hereafter "the Act"), a harbor worker engaged in maritime employment, upon navigable waters, or was he a construction worker engaged in non-maritime employment, outside of navagible waters, at the time of his injury?

A hearing was held in Norfolk, Virginia July 29, 1976. Medical reports and a cover letter were received August 10, 1976, and have been accepted as Joint Exhibit No. 1. Claimant and Respondent subsequently submitted briefs. The Office of Solicitor of Labor advised of an intention to submit a post-hearing brief, which was due by September 9, 1976. To date no brief has been received from the Office of the Solicitor of Labor.

The conclusion must be that Claimant was neither engaged in maritime employment nor did the injury occur upon the navigable waters of the United States. Claimant must continue to receive his benefits under the compensation act of the State of Virginia.

Factual Resume

Claimant alleges permanent disability resulting from a back injury which occurred March 1, 1976, while employed by Brown and Root, Inc. (Employer). He also alleges "a residual injury to his lungs resulting from sandblasting." The latter claim will be discussed first.

No claim has ever been filed alleging a lung injury. Respondent further denies timely notice and denies that the injury occurred in the course of employment.

APPENDIX D

The testimony of Claimant was that he had not worked since March 1, 1976 due to the back injury alone. He further testified his lungs pained him on occasion and he is more susceptible to colds. The medical evidence concluded:

> "Pulmonary function testing was performed and did not reveal significant impairment at this time. If, however, the patient continues to be exposed to sandblasting without wearing protective respiratory equipment, permanent pulumonary impairment could occur. I would recommend that he either wear adequate respiratory protective equipment at all times or discontinue working as a sandblaster."

No disability, either medical or economic, has been established. Claimant is entitled to no benefits for an alleged lung injury.

The back injury presents a more difficult question.

Newport News Shipbuilding and Drydock (Newport) contracted with the Employer to have the Employer construct an expansion of the shipbuilding and drydock facilities adjacent to the existing facilities along the James River (called the North Yard Expansion).

The Employer is a corporation with no corporate ties to Newport. The Employer is composed of several divisions, such as the heavy domestic — overseas division, the power plant division, marine division, industrial civil division, mining division and oil field division. Claimant was an Employee of the heavy domestic — overseas division, which engaged exclusively in heavy construction work.

Construction of the North Yard Expansion began in early 1972. The site was to be constructed over land that until 1972 had been a navigable part of the James River. A sea wall was constructed and land fill was brought in. The fill forced out the water. On March 1, 1976 the whole expansion area had been filled and the construction was 60 percent com-

APPENDIX D

plete. A fence separated the construction site from the already operating area of Newport.

Claimant had worked for the Employer approximately three years at the time of his back injury. He had worked on the Newport job six months to a year. He was a painter and sandblaster.

As the project continued the paint shop, a temporary construction facility, moved to different locations. On March 1, 1976 Claimant lifted a heavy generator housed in the paint shop, then about 100 feet from the James River, injuring his back. He intented to take the generator to a drydock under construction.

Claimant did not work on ships. Neither did he assist in loading or unloading ships. Thus, there is no contention he was a longshoreman. (He belonged to no union) Rather, he contends he was a harbor worker.

The Law

Harbor workers are those who "labor or provide services for the furtherment of ship's business" (except members of the ship's company). Norris, *Maritime Personal Injuries*, Section 3.

As Norris points out, Harbor Workers are the following: longshoremen (those who load and unload cargo), maintenance men (such as shipcleaners, tank cleaners, riggers, carpenters, electricians, painters, mechanics), cargo checkers, cargo weighers, cargo talleyers, ship ceilers, port watchmen and repairmen (welders, riveters, steam fitters, plumbers).

Implicit in the above is that the harbor worker labors or provides services for the furtherment of ship's business. This has been called the status requirement (Section 2(3) of the

Act). Put another way, the Claimant must be engaged in maritime employment.

A second requirement is that the injury occur upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. This has been called the situs requirement. (Section 3(a) of the Act.)

In both the status and situs requirement, Claimant here fails.

Claimant fails to meet the situs requirement because he was not working upon navigable water or an adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel. This area was to become an area that, when completed, would meet the situs requirement. That time, however, was in the future. Cases so holding are *Nacirema* v. *Johnson,* 396 U.S. 212, 90 S. Ct. 347 (1969) and *Motteler* v. *J.A. Jones Construction Company,* 457 F2d. 917 (7th Cir. 1972). A case to the contrary is *Travelers Insurance Company* v. *McManigal,* 139 F2d. 949 (4th Cir. 1944). These cases carry little weight because decided prior to the 1972 amendments to the Act.

The most compelling argument against Claimant, however, is that he fails to meet the status requirement — that is, he was engaged in construction employment and not in maritime employment.

In *Weyerhauser Company* v. *Gilmore,* 528 F.2d 957 (9th Cir. 1976) a case decided since the 1972 amendments to the Act, the Administrative Law Judge found that a pondman injured while sorting logs on a salt bay of the Pacific Ocean was not engaged in maritime employment. The benefits Review Board reversed. The language of the Circuit Court in

vacating the decision of the Benefits Review Board, aptly applies to the instant fact situation (Page 961):

> "The 1972 amendment pre-requisite of 'maritime employment' is a clearly expressed congressional perpetuation of the essential element of admiralty jurisdiction over the employee. . . .
>
> "We hold that for an injured employee to be eligible for federal compensation under LHCA, his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to traditional maritime activity involving navigation, and commerce on navigable waters, with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in Section 903."

Claimant's construction work had no realistically significant relationship to any maritime activity. He was a construction worker, not a maritime worker. It is simply coincidental that the facility on which he was working, and the future employees of that facility, would some day have the necessary maritime relationship.

Order

The claim of Benjamin F. Stewart for compensation under the Act is DENIED.

/s/ Edward C. Burch
Administrative Law Judge

Dated: September 30, 1976
Washington, D.C.

APPENDIX E

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

IN THE MATTER OF

MARY M. JOYNER (Widow)
ARTHUR E. JOYNER (Deceased)
Claimant

v.

BROWN & ROOT, INC.
Employer

Case No. 76-LHCA-654

OWCP No. 5-11972

and

THE TRAVELERS INSURANCE COMPANY
Carrier

Robert A. Farris, Jr., Esquire
303 East Nash Street
Wilson, North Carolina 27893
For the Claimant

Harry E. McCoy, Esquire
Seawell, McCoy, Dalton, Hughes
Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510
For the Employer and Carrier

William J. Kilberg, Solicitor
Laurie M. Streeter, Associate Solicitor
Linda L. Carroll, Esquire
U.S. Department of Labor
Suite N-2716, NDOL
200 Constitution Avenue, N.W.
Washington, D.C. 20210

BEFORE: FREEMAN C. MURRAY
Administrative Law Judge

APPENDIX E

DECISION AND ORDER
Jurisdiction and Procedural History

This is a claim for a widow's and child's compensation benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.* (hereinafter cited as the Act), and the Rules and Regulations promulgated thereunder, 20 C. F. R. Parts 701 and 702.

After due notice a hearing was held in Raleigh, North Carolina on June 23, 1976. It was reported that decedent's proper name was Arthur E. Joyner, and that all appropriate documents will be modified to show the correct name (Tr. 40).

Stipulations

It was stipulated and agreed by and between the parties that at all times pertinent to this case. (Tr. 5, 6):

1. The decedent Arthur E. Joyner and Employer were in an employee-employer relation.

2. The decedent sustained a fatal injury on May 14, 1975, which arose out of and in the course of his employment.

3. At the time of injury and death decedent's average weekly wage was $391.23.

4. The Claimant, Mary M. Joyner, remarried on February 24, 1976, and is now known as Mary M. VanderHeyden (ALJ Exh. No. 43, Tr. 26-28).

5. The Claimant paid $825.83 on the funeral bill for decedent, and Claimant has been paid $800.00 under the Virginia State Compensation Act on said funeral bill.

6. The Claimant has been awarded death benefits under the Virginia State Compensation act.

7. The Claimant's dependency upon decedent is not an issue.

Issue

The issue to be resolved in this matter is whether decedent Arthur E. Joyner was covered by the provisions of the Act, that is, whether decedent was engaged in maritime employment at the time of his injury and death.

Findings of Fact and Conclusions of Law

Based upon the entire record in this case, and my observation of the witnesses and their demeanor, I make the following Findings of Fact and Conclusions of Law.

The stipulations agreed to by the parties are consistent with the evidence, and I find them to be established as facts.

Claimant was married to Decedent in May, 1975, and had one son, Arthur Earl Joyner, III, who was born December 26, 1969 (Tr. 26, 27).

The circumstances surrounding this tragic accident are not in dispute. Newport News Shipbuilding and Dry Dock Corporaiton had engaged Employer to construct a new shipbuilding and drydock facility called the North Yard, which adjoined the existing yard on the North, and was separated therefrom by an eight-foot chain anchor fence (Tr. 35). In constructing the new yard it was necessary to use fill dirt, some of which was brought in on the James River by barge, mixed with water, and pumped ashore into a settling area where the water could drain away. Decedent was foreman of the Excavation Department of Employer, and on the day of

his death was supervising activities designed to free a Caterpillar 623, a self-loading earth mover (Employer-Carrier Exh. Nos. 4, 5, 6, 7, 8 and 9), from where it had become stuck in the area of the settling pond. There were no eyewitnesses, but it is apparent that the machine struck or ran over Mr. Joyner, causing his death (Tr. 22, 25).

Brown and Root, Inc., has several operating divisions, including a Marine Division that operates shipyards in other locations, and the Overseas Domestic Division, a construction entity, which was constructing the North Yard (Tr. 15, 16, 25). The project began in 1973 (Tr. 15, 25), and shipyard personnel arrived and the first shipbuilding or repair activity began in October 1975 (Tr. 24, 32). The existing yard continued its normal production (Tr. 34). At the time of Mr. Joyner's death the North Yard was still in the stage of construction (Tr. 8, 20, 21, 23; Employer-Carrier Exh. No. 3).

Section 2(3) of the Act provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . .

and Section 3(a) of the Act provides:

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . .

Section 2(3) has been referred to as the status requirement; that is, that the decedent must have been engaged in maritime employment. Section 3(a) has been referred to as

APPENDIX E

the situs requirement; that is, that the decedent must have been injured on the navigable waters of the United States, which includes the delineated adjoining areas.

Both requirements are essential if a claimant is to qualify for coverage under the Act, and in this instance neither requisite has been established.

The clear import of the language of Section 2(3) is that in order to be an "employee", the individual must have engaged in maritime employment; that is, he must have been loading ships, or providing repairs and services to them. In this case, decedent was a construction worker exposed to the hazards of that trade, but not to the dangers of maritime employment. Thus he does not meet the "status" test.

As to Section 3(a), Mr. Joyner's death occurred in an area adjoining navigable waters of the United states, but it was not yet "customarily used by an employer in loading, unloading, repairing, or building a vessel." Consequently, at the time it was nothing more than a construction site, and thus the "situs" test is not met.

I have carefully examined the cases cited in the briefs of Claimant and the Director, OWCP; however, those decisions prior to the 1972 Amendments to the act did not contemplate the "status" test, and for that and other reasons I do not find them to be persuasive.

Furthermore, adverting to the Congressional Committee reports on the 1972 Amendments (S. Rpt. No. 92-1125; H. Rpt. No. 92-1441), I find:

> The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters for such activity.

Additionally, I have examined a recent decision by the Honorable Edward C. Burch, *Benjamin F. Stewart* v. *Brown and*

APPENDIX E

Root, Inc., 76-LHCA-762 (September 30, 1976), in which the pertinent facts are quite similar. After my own research I find I concur in Judge Burch's conclusions.

ORDER

IT IS HEREBY ORDERED that the claim of Mary M. Joyner be, and the same is hereby denied.

/s/ Freeman C. Murray
Administrative Law Judge

Dated: October 15, 1976
Washington, D.C.

APPENDIX F

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036
211 Main Street, Suite 600
San Francisco, California 94105

IN THE MATTER OF

BENJAMIN F. STEWART
Claimant

v.

BROWN & ROOT, INC.
Employer

Case No. 76-
LHCA-762
OWCP No. 5-12902

THE TRAVELERS INSURANCE
COMPANY
Carrier

DECISION AND ORDER ON REMAND

A formal hearing before the undersigned was held in Norfolk, Virginia, July 29, 1976. On September 30, 1976, a Decision and Order was signed denying claimant benefits under the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* ("the Act") for the reason there is no coverage under the Act. By an Order of the Benefits Review Board dated January 12, 1978, the Decision and Order of September 30, 1976, was reversed and the case was remanded for determination of benefits due claimant under the Act. In accordance with the dictates of the Benefits Review Board, the following facts are found.

APPENDIX F

Findings of Fact and Conclusions of Law

1. Claimant sustained a back injury March 1, 1976, while earning an average weekly wage of $304.00 in the course of his employment with Brown & Root, Inc. ("employer").

2. Claimant is to receive the benefits of the Act.

3. Claimant was paid the sum of $149.00 per week from March 10, 1976 to the date of the hearing, July 29, 1976, under the Workmen's Compensation Laws of the State of Virginia. Whether the State of Virginia continued to pay benefits subsequent to the date of hearing is not known.

4. The employer became aware of the injury on March 2, 1976.

5. Although the respondents were advised of their burden to establish timely controversion under section 914 of the Act, there was no evidence so adduced. The 10 percent penalty must be assessed.

6. Respondents are to pay any medical expenses resulting from the injury of March 1, 1976.

7. The Order of September 30, 1976, concluded, with respect to an alleged lung injury: "No disability, either medical or economic, has been established. Claimant is entitled to no benefits for an alleged lung injury." There was no appeal from this determination. It thus becomes the law of the case.

8. At the hearing of July 29, 1976, no medical evidence was produced. The record was kept open for receipt of medical reports. Claimant's attorney did not at that time know the extent of his client's alleged permanent disability. He was permitted to make that allegation in a post-hearing brief. August 10, 1976, medical reports were received which concluded that as of July 30, 1976, claimant had "a 20 percent disability for work for an as yet undetermined period of time." The cover letter of claimant's attorney asked for a 20

percent permanent disability from the back injury. The post-hearing brief of claimant's attorney was received September 20, 1976, which concluded:

> Therefore, claimant submits that an award should be rendered in his favor under the Longshoremen's and Harbor Workers' Compensation Act for his 20 percent work-related disability.

9. Although no claim for total disability has been alleged, I find claimant was, due to his back injury, unable to work from the time of the injury to the date of the hearing, July 29, 1976. Because disability under the Act is an economic concept based upon a medical foundation, *Perini* v. *Heyde*, 306 F.Supp. 1321 (1969), the conclusion must be that for that period of time claimant was temporarily totally disabled.

10. Whether claimant has been able to work since the hearing is unknown. However, on the basis of his attorney's post-hearing contentions of a 20 percent disability, there is no basis on which to, at this time, find a disability greater than 20 percent subsequent to the hearing. Because the doctor concluded, on July 30, 1976, that the 20 percent disability would exist "for an as yet undetermined period of time," the conclusion must further be that the 20 percent disability as of July 30, 1976, is temporary and not permanent. The finding of a 20 percent temporary partial disability from July 30, 1976 to date, and continuing, is, of course, subject to modification upon application by either party under section 922 of the Act.

11. Claimant's attorney requested an attorney fee of $587.50 and reimbursement for costs of $37.80 for appearance before the undersigned. These amounts are reasonable and are to be reimbursed. Any application for fee or costs before the Benefits Review Board must be addressed to that forum.

Order

1. Respondents are to pay claimant the sum of $202.67 per week from March 1, 1976 through July 29, 1976, as compenstion for temporary total disability under the Act.

2. Respondents are to pay claimant the sum of $40.53 per week from July 30, 1976 to date and continuing for a 20 percent temporary partial disability.

3. Credit is to be given for payments made by the State of Virginia.

4. Six percent interest is to be added to the sum owing to date.

5. There is to be added to all unpaid installments to date an amount equal to 10 percent thereof.

6. Respondents are to pay claimant's counsel an attorney fee of $587.50 and costs of $37.80.

7. Respondents are to pay medical expenses resulting from the back injury of March 1, 1976.

/s/ Edward C. Burch
Administrative Law Judge

Dated: March 6, 1978
San Francisco, California

ECB:scm

APPENDIX G

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

IN THE MATTER OF

MARY M. JOYNER (Widow)
ARTHUR E. JOYNER (Deceased)
Claimant

v. Case No. 76-LHCA-654

OWCP No. 5-11972

BROWN & ROOT, INC. BRB Nos. 76-141
Employer 76-141A

and

THE TRAVELERS INSURANCE COMPANY
Carrier

Robert A. Farris, Jr., Esq.
Farris, Thomas and Farris
303 East Nash Street
Wilson, North Carolina 27893
For the Claimant

Harry E. McCoy, Esq.
George M. Kelley, III, Esq.
Seawell, McCoy, Dalton, Hughes, Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510
For the Respondents

APPENDIX G

Carin Ann Clauss, Solicitor
Laurie M. Streeter, Associate Solicitor
Linda L. Carroll, Esq.
U.S. Department of Labor
200 Constitution Avenue, N.W.
Suite N-2716
Washington, D.C. 20210
For the Director, OWCP

Before: FREEMAN C. MURRAY
Administrative Law Judge

DECISION AND ORDER ON REMAND

The Benefits Review Board specifically found decedent was a "harbor worker" and met the "situs" requirements of the Act, and remanded the case directing that benefits for Claimant be determined. *Joyner* v. *Brown & Root, Inc.*, 7 BRBS —, BRB Nos. 76-471 and 76-471A (January 12, 1978); 33 U.S.C. 902(3) and 903(a).

At the hearing on June 23, 1976, it was stipulated:

1. The decedent Arthur E. Joyner and Employer were in an employee-employer relation.

2. The decedent sustained a fatal injury on May 14, 1975, which arose out of and in the course of his employment.

3. At the time of injury and death decedent's average weekly wage was $391.23.

4. The Claimant, Mary M. Joyner, remarried on February 24, 1976, and is now known as Mary M. Vanderheyden (ALJ Ex. No. 43, Tr. 26-28).

5. The Claimant paid $825.83 on the funeral bill for decedent, and Claimant has been paid $800.00 under the Virginia State Compensation Act on said funeral bill.

6. The Claimant has been awarded death benefits under the Virginia State Compensation Act.

7. The Claimant's dependency upon decedent is not an issue.

Benefits:

Claimant and decedent had one child, a son, Arthur Earl Joyner, III, born December 26, 1969.

Claimant is entitled to fifty percent of decedent's average weekly wage of $391.23, or $195.62 per week, during her widowhood, with two years' compensation to be paid in a lump sum upon her remarriage on February 24, 1976.

The child is entitled to 16-2/3 percent of decedent's average weekly wage of $391.23, or $65.21 per week, until Claimant's remarriage on February 24, 1976 when his compensation shall increase to fifty percent of decedent's average weekly wage of $391.23, or $195.62 per week, to continue during his childhood. 33 U.S.C. 902(14) and 909.

Claimant was awarded death benefits under the Virginia State Compensation Act (Virginia Act); Respondents are entitled to credit for such benefits as appropriate under the Act.

Claimant paid $825.83 on the funeral expenses, and was reimbursed $800.00 under the Virginia Act; she is entitled to be reimbursed further by Respondents in the amount of $25.83. 33 U.S.C. 909(a).

Penalties and Interest:

Section 14 of the Act provides that where compensation is not paid in timely fashion, penalties shall be invoked in the

absence of a timely notice of controversion, or exculpatory circumstances. 33 U.S.C. 914.

Mr. Joyner was killed on May 14, 1975, and the first notice of controversion was dated October 7, 1975, more than fourteen days after Employer had knowledge of the death. Exculpatory circumstances are not shown.

Penalties and interest are assessable on overdue payments of compensation.

Attorney Fee:

Claimant's attorney filed an application for an attorney fee which was received on July 27, 1976. The matter was not considered because of the previous disposition of the case. After current review, I find the application does not conform sufficiently with 20 C.F.R. 702.132 *et seq.* Time will be afforded to submit a further application.

ORDER

1. Respondents shall pay claimant compensation for the death of Arthur E. Joyner at the rate of $195.62 per week beginning May 14, 1975, and continuing until her remarriage on February 24, 1976, said death benefits to be adjusted pursuant to Section 10 of the Act, and Claimant shall then be paid two years' compensation in a lump sum; Respondents shall receive appropriate credit for death benefits paid her under the Virginia State Compensation Act.

2. Respondents shall pay Arthur Earl Joyner, III, compensation for the death of Arthur E. Joyner at the rate of $65.21 per week beginning May 14, 1975, and continuing until Claimant's remarriage on February 24, 1976, and on that date his compensation rate shall increase to $195.62 per week to continue during his childhood; all such death

APPENDIX G

benefits shall be adjusted pursuant to Section 10 of the Act; Respondents shall receive appropriate credit, if any, for death benefits paid under the Virginia State Compensation Act.

3. Respondents shall pay claimant and Arthur Earl Joyner, III, as additional compensation, an amount equal to ten percent of each installment payment not timely paid pursuant to Section 14 of the Act, with due consideration given to payments received by reason of death benefits paid under the Virginia State Compensation Act, together with interest at the rate of six percent per annum, computed from the date each installment, or portion thereof as affected by death benefits under the Virginia Act, became due until paid.

4. Respondents shall pay Claimant $25.83 for funeral expenses of Arthur E. Joyner.

5. All sums now due Claimant and Arthur Earl Joyner, III, shall be paid forthwith in a lump sum.

6. Robert A. Farris, Jr., Esquire, of Farris, Thomas and Farris, shall have thirty days from the date of this Order to submit an application for approval of an attorney fee for services performed before this tribunal, with a copy thereof to be furnished Respondents counsel who shall have fifteen days to comment thereon.

/s/ Freeman C. Murray
Administrative Law Judge

Dated: February 17, 1978
Washington, D.C.

FCM/ds

APPENDIX H

FILED AS PART OF THE RECORD — JULY 24, 1978;
Agnes Kurtz, Clerk, Benefits Review Board
U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

BENJAMIN F. STEWART
Claimant-Respondent

v.

BROWN & ROOT, INC. BRB No. 78-288

and DECISION

TRAVELERS INSURANCE COMPANY
Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

Appeal from the Decision and Order of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

James R. Sheeran, Richmond, Virginia, for the claimant.

George M. Kelley, III (Seawell, McCoy, Dalton, Hughes, Gore & Timms), Norfolk, Virginia, for the employer/carrier.

Laurie M. Streeter (Carin Ann Clauss, Solicitor of Labor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

APPENDIX H

Before: SMITH, Chairman, and MILLER, Member.

Per Curiam:

This is an appeal by the employer/carrier (hereinafter, the employer) from a Decision and Order On Remand (76-LHCA-762) of Administrative Law Judge Edward C. Burch pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereafter, the Act).

The facts of this case are discussed in the decision issued by this Board in the original appeal by this claimant. *Stewart* v. *Brown & Root, Inc.*, 7 BRBS 356, BRB No. 76-451 (Jan. 12, 1978). In that decision we reversed the administrative law judge's determination that claimant was not an employee under the Act, and was not injured at a situs covered by the Act. 33 U.S.C. §§902(3) & 903(a). We therefore remanded the case for determination of benefits due to claimant under the Act. The administrative law judge on remand complied with our instructions and assessed disability compensation, interest and additional compensation as provided by Section 14(e) of the Act. 33 U.S.C. §914(e).

Employer appeals from the Decision and Order On Remand. Employer argues that claimant was not a maritime employee, that he was not injured at an appropriate situs, and that employer is not liable for interest or the Section 14(e) assessment.

Employer appealed the Decision and Order On Remand directly to the United States Court of Appeals for the Fourth Circuit at the same time it appealed to the Board. Employer filed a motion with the Board for leave to file additional memoranda as might be necessitated by the decision of the Court of Appeals.

The Fourth Circuit has dismissed the employer's appeal for lack of jurisdiction without prejudice to a new appeal after the Board has finally decided the pending appeal.

APPENDIX H

Stewart v. *Brown & Root, Inc.*, No. 78-1235 (4th Cir. July 7, 1978). Since the Fourth Circuit has dismissed the interlocutory appeal, and since all of the issues, jursidiction and liability for interest and the Section 14(e) assessment, have been adequately briefed, employer's motion for leave to file additional memoranda is hereby denied.

We hold that this claim is compensable under the Act. The injury occurred upon a jurisdictional situs as defined in Section 3(a) of the Act. Claimant was a harbor worker and, therefore, a maritime employee covered under Section 2(3). These issues were discussed in the original appeal in this case, *Stewart* v. *Brown & Root, Inc.*, 7 BRBS 356, BRB No. 451 (January 12, 1978). For the reasons stated in that decision we find that this claim is within the jurisdiction of the Act.

Employer also appeals arguing that it should not be liable for interest or additional compensation as provided in Section 14(e). In his decision the administrative law judge found that employer failed to file a timely notice of controversion after it had knowledge of the injury as required by Section 14(e). The Court of Appeals for the Fourth Circuit has recently held that the assessment of additional compensation under Section 14(e) is mandatory in a case where the employer failed to file a timely notice of controversion. *Newport News Shipbuilding and Dry Dock Co.* v. *Graham*, 573 F.2d 167 (4th Cir. March 13, 1978), *aff'g, Jones* v. *Newport News Shipbuilding and Dry Dock Co.*, 5 BRBS 323, BRB No. 76-320 (Jan. 4, 1977). The Court of Appeals also approved the assessment of interest.

Claimant's attorney has submitted an itemized statement of the work performed in this appeal pursuant to 20 C.F.R. §702.132. Our review of this statement reveals that 2.7 of the hours claimed relate to work performed at the administrative law judge level and, therefore, the fees for this work must be awarded by him.

APPENDIX H

The items disallowed are phone calls and correspondence to employer's counsel and to the administrative law judge while the case was on remand, time spent drafting a Petition for Reconsideration to the administrative law judge, and correspondence with a physician regarding a medical report which related to the request for reconsideration. Two tenths of an hour have been disallowed for the letter to the administrative law judge withdrawing the Petition for Reconsideration.

Claimant is granted a fee in the amount of $1,391.26 to be paid directly to him by the employer in a lump sum. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/s/ Samuel J. Smith,
Chairman

/s/ Julius Miller,
Member

Dated this 24th day
of July, 1978

APPENDIX H

SERVICE SHEET

BRB No. 78-288: *BENJAMIN F. STEWART* v. *BROWN & ROOT, INC.* and *TRAVELER'S INSURANCE COMPANY* (Case No. 76-LHCA-762) (OWCP No. 5-12902)

A copy of this Order has been sent to the following:

George M. Kelly, III, Esq. — Certified
Seawell, McCoy, Dalton, Hughes,
Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510

James R. Sheeran, Esq. — Certified
2315 E. Broad Street
Richmond, Virginia 23223

Miss Laurie M. Streeter
Associate Solicitor
U.S. Department of Labor
Suite N-2716, NDOL
Washington, D.C. 20210

Mr. B.E. Voultsides
US DOL/ESA/OWCP
3661 Virginia Beach Blvd. East
Room 101
Norfolk, Virginia 23502

Mr. Ralph M. Hartman
Acting Director, Office of Workers'
Compensation Programs
U.S. Department of Labor
Suite S-3524, NDOL
Washington, D.C. 20210

Judge Edward C. Burch
U.S. Department of Labor
1111 - 20th St., N.W.
Suite 700
Washington, D.C. 20036

APPENDIX I

FILED AS PART OF THE RECORD — JULY 24, 1978;
Agnes Kurtz, Clerk, Benefits Review Board
U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

MARY M. JOYNER
(WIDOW OF ARTHUR E. JOYNER)
Claimant-Petitioner

v.

BROWN & ROOT, INC. BRB No. 78-281

and DECISION

TRAVELERS INSURANCE
COMPANY
Employer/Carrier-
Petitioners

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION
PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR
Party-in-Interest

Appeal from the Decision and Order of Freeman C. Murray, Administrative Law Judge, United States Department of Labor.

Robert A. Farris, Jr. (Farris, Thomas & Farris), Wilson, North Carolina, for the claimant.

George M. Keiley, III (Seawell, McCoy, Dalton, Hughes, Gore, & Timms), Norfolk, Virginia, for the employer/carrier.

APPENDIX I

Laurie M. Streeter (Carin Ann Clauss, Solicitor of Labor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, Chairman, and MILLER, Member.

Per Curiam:

This is an appeal by the employer/carrier (hereinafter, the employer) from a Decision and Order On Remand (76-LHCA-654) of Administrative Law Judge Freeman C. Murray pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereafter, the Act).

The facts of this case are discussed in the decision issued by this Board in the original appeal by this claimant. *Joyner* v. *Brown & Root, Inc.*, 7 BRBS 608, BRB Nos. 76-471, 471A (Jan. 12, 1978). In that decision we reversed the administrative law judge's determination that decedent was not an employee under the Act, and was not injured at a situs covered by the Act. 33 U.S.C. §§902(3) & 903(a). We therefore remanded the case for determination of benefits due to claimant under the Act. The administrative law judge on remand complied with our instructions and assessed death benefits, interest and additional compensation as provided by Section 14(e) of the Act. 33 U.S.C. §914(e).

Employer appeals from the Decision and Order On Remand. Employer argues that decedent was not a maritime employee, that he was not injured at an appropriate situs, and that employer is not liable for interest or the Section 14(e) assessment.

Employer appealed the Decision and Order On Remand directly to the United States Court of Appeals for the Fourth Circuit at the same time it appealed to the Board. Employer filed a motion with the Board for leave to file additional

APPENDIX I

memoranda as might be necessitated by the decision of the Court of Appeals.

The Fourth Circuit has dismissed the employer's appeal for lack of jurisdiction without prejudice to a new appeal after the Board has finally decided the pending appeal. *Joyner* v. *Brown & Root, Inc.*, No. 78-1189 (4th Cir. June 14, 1978). Since the Fourth Circuit has dismissed the interlocutory appeal, and since all of the issues, jurisdiction and liability for interest and the Section 14(e) assessment, have been adequately briefed, employer's motion for leave to file additional memoranda is hereby denied.

We hold that this claim is compensable under the Act. The injury occurred upon a jurisdictional situs as defined in Section 3(a) of the Act. Decedent was a harbor worker and, therefore, a maritime employee covered under Section 2(3). These issues were discussed in the original appeal in this case, *Joyner* v. *Brown & Root, Inc.*, 7 BRBS 608, BRB No. 471, 471A (January 12, 1978). For the reasons stated in that decision we find that this claim is within the jurisdiction of the Act.

Employer also appeals arguing that it should not be liable for interest or additional compensation as provided in Section 14(e). In his decision the administrative law judge found that employer failed to file a timely notice of controversion after it had knowledge of the injury as required by Section 14(e). The Court of Appeals for the Fourth Circuit has recently held that the assessment of additional compensation under Section 14(e) is mandatory in a case where the employer failed to file a timely notice of controversion. *Newport News Shipbuilding and Dry Dock Co.* v. *Graham*, 573 F.2d 167 (4th Cir. March 13, 1978), *aff'g, Jones* v. *Newport News Shipbuilding and Dry Dock Co.*, 5 BRBS 323, BRB No. 76-320 (Jan. 4, 1977). The Court of Appeals also approved the assessment of interest.

APPENDIX I

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/s/ Samuel J. Smith, Chairman

/s/ Julius Miller, Member

Dated this 24th day
of July, 1978

SERVICE SHEET

BRB No. 78-281: *MARY M. JOYNER* v. *BROWN & ROOT, INC. AND TRAVELERS INSURANCE COMPANY* (Case No. 76-LHCA-654) (OWCP No. 5-11972)

A copy of this Order has been sent to the following:

George M. Kelley, III, Esq. — Certified
Seawell, McCoy, Dalton, Hughes,
Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510

Robert A. Farris, Jr., Esq. — Certified
Farris, Thomas and Farris
303 East Nash Street
Wilson, North Carolina 27893

Miss Laurie M. Streeter
Associate Solicitor
U.S. Department of Labor
Suite N-2716, NDOL
Washington, D.C. 20210

Mr. Ralph M. Hartman
Director, Office of Workers' Compensation Programs
U.S. Department of Labor
Suite S-3524, NDOL
Washington, D.C. 20210

Mr. B.E. Voultsides
US DOL/ESA/OWCP
3661 Virginia Beach Blvd. East
Room 101
Norfolk, Virginia 23502

Judge Freeman C. Murray
U.S. Department of Labor
1111 - 20th St., N.W.
Suite 700
Washington, D.C. 20036

Supreme Court, U. S.
FILED
MAY 13 1980
DAK, JR., CLERK

No. 79-1136

In the Supreme Court of the United States

OCTOBER TERM, 1979

BROWN & ROOT, INC. AND
TRAVELERS INSURANCE COMPANY, PETITIONERS

v.

MARY M. JOYNER, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

JOSHUA T. GILLELAN II
MARY-HELEN MAUTNER
KERRY L. ADAMS
Attorneys
Department of Labor
Washington, D.C. 20210

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	8
Conclusion	14

CITATIONS

Cases:

Fusco v. *Perini North River Assoc.*, 601 F.2d 659, vacated and remanded, No. 79-759 (Jan. 14, 1980)	11, 12
Jacksonville Shipyards, Inc. v. *Perdue*, 539 F.2d 533	10, 11, 13
Newport News Shipbuilding & Dry Dock Co. v. *O'Hearne*, 192 F.2d 968	6
Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249	6, 8, 10, 11
P.C. Pfeiffer Co. v. *Ford*, No. 78-425 (Nov. 27, 1979)	10, 11
Thibodaux v. *Atlantic Richfield Co.*, 580 F.2d 841, cert. denied, 442 U.S. 909	10, 11
Travelers Insurance Co. v. *Branham*, 136 F.2d 873	6
Travelers Insurance Co. v. *McManigal*, 139 F.2d 949	6
Walter Tantzen, Inc. v. *Shaughnessy*, 601 F.2d 670, vacated and remanded, No. 79-1329 (Apr. 21, 1980)	11
Weyerhaeuser Co. v. *Gilmore*, 528 F.2d 957, cert. denied, 429 U.S. 868	9, 11, 12

Statute: Page

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 5

Section 2(3), 33 U.S.C. 902(3) 2, 5, 8, 9, 10, 11, 12

Section 2(4), 33 U.S.C. 902(4) 11

Section 3(a), 33 U.S.C. 903(a) 2, 3, 5, 7, 8, 12, 13

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1136

BROWN & ROOT, INC. AND
TRAVELERS INSURANCE COMPANY, PETITIONERS

v.

MARY M. JOYNER, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-7) is reported at 607 F.2d 1087. The original opinions of the Benefits Review Board (Pet. App. A-8 to A-22) are reported at 7 B.R.B.S. 356 and 7 B.R.B.S. 608. The administrative law judges' original decisions (Pet. App. A-24 to A-35) are re-

ported at 5 B.R.B.S. (ALJ) 37 and 5 B.R.B.S. (ALJ) 42; their decisions on remand from the Board (Pet. App. A-36 to A-44) are not reported. The Board's opinions on petitioners' appeals from the awards entered on remand (Pet. App. A-45 to A-48, A-50 to A-53) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 1979. The petition for a writ of certiorari was filed on January 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether workers engaged in the construction of a dry dock are "engaged in maritime employment" and are therefore "employees" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

2. Whether a dry dock and an adjacent shipyard, during their construction, qualify as "navigable waters of the United States," within the meaning of Section 3(a) of the Act.

STATUTE INVOLVED

Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker * * *.

Section 3(a) of the Act, 33 U.S.C. 903(a), provides:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel). * * *

STATEMENT

Newport News Shipbuilding & Dry Dock Co. hired petitioner Brown & Root as an independent construction contractor to build new shipbuilding and dry dock facilities, known as the "North Yard," adjacent to Newport News Shipbuilding's existing shipyard (Pet. App. A-26). Respondent Benjamin Stewart was injured, and Arthur Joyner, husband of respondent Mary Joyner, was killed while engaged in the construction of the new graving dry dock at the North Yard (Pet. App. A-4, A-9, A-20 to A-21).

The new facilities were constructed on a site that was formerly a navigable part of the James River (Pet. App. A-4, A-26). Brown & Root began con-

struction by building a seawall to enclose part of the river. Arthur Joyner, Brown & Root's excavation foreman, was killed in May 1975 during the process of filling in the bulkheaded area of the river. Sand from channel-dredging operations was brought up the river by barge, mixed with water, and pumped into a "reclaiming pit" in the bulkheaded area (*id.* at A-4, A-26, A-32). After the sand settled and the water drained, earth-moving equipment carried the sand wherever it was needed as fill material. During the process of placing sand as backfill to support the partially completed concrete walls of the new dry dock, an earth-moving machine became mired in the reclaiming pit. While directing the operations to free the earth-mover, Joyner was struck by the machine and killed (*id.* at A-4, A-21).

Benjamin Stewart worked for Brown & Root as a painter and sandblaster in all areas of the North Yard project (Pet. App. A-27). His job included sandblasting barnacles and sea grass from pilings on the interior of the incomplete graving dry dock (*id.* at A-9). His work was based at the project's "paint shed," which was moved from one location to another within the new Yard as construction progressed (*id.* at A-27). At the time of his injury in March 1976, the project was approximately 60% complete, and the shed was located approximately 100 feet from the bulkhead that established the new edge of the river (*id.* at A-26 to A-27). Stewart injured his back when he loaded a heavy generator, which had been housed at the shed, onto a truck for

immediate transfer to the uncompleted graving dock (*id.* at A-4, A-9, A-27).

Petitioners paid respondents Stewart and Joyner workers' compensation benefits under Virginia law, but opposed their claims for the higher benefits payable under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* Petitioners maintained that respondents failed to satisfy the "status" test in Section 2(3) of the Act, 33 U.S.C. 902(3), and the "situs" requirement in Section 3(a) of the Act, 33 U.S.C. 903(a). The administrative law judges who heard the two cases agreed that neither test was met and denied the claims (Pet. App. A-24 to A-35).

The Benefits Review Board reversed the administrative law judges' rulings (Pet. App. A-8 to A-22). On the "status" question, the Board held that Joyner and Stewart were "harborworkers," and hence "engaged in maritime employment," within the meaning of Section 2(3). The Board ruled that the statutory term "harborworker" includes "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves, and adjacent areas used in the loading, unloading, repair or construction of ships)" (Pet. App. A-16 to A-17). The Board also held that the Act's "situs" requirement was satisfied because, "[a]t the time of [their] injur[ies], claimant[s were] in an area which, upon completion of construction, would qualify under Section 3(a) as an 'adjoining area customarily used

by an employer in * * * building a vessel'" (*id.* at A-17). The Board ruled that "[t]he incomplete state of the North Yard Project will not prevent claimant[s] from passing the 'situs' test" (*ibid.*).

In reaching its conclusions, the Board relied on cases decided by the Fourth Circuit before the extension of the Act's coverage in 1972. *Travelers Insurance Co.* v. *Branham*, 136 F.2d 873 (1943); *Travelers Insurance Co.* v. *McManigal*, 139 F.2d 949 (1944); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F.2d 968 (1951). The Board reasoned that the 1972 amendments were intended to expand the Act's coverage and did not exclude any employees who formerly would have been covered (Pet. App. A-12, A-22). Because the pre-1972 cases established that employees engaged in the construction or repair of a dry dock were covered by the Act, and because the 1972 amendments were intended "to provide continuous coverage throughout their employment to * * * workers who [otherwise] would be covered only for part of their activity" (*Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 273 (1977)), the Board concluded that dry dock construction workers injured in or near the facility under construction are covered by the amended Act (Pet. App. A-13 to A-14). The Board therefore directed the administrative law judges to enter compensation awards for both claimants.

The court of appeals upheld the finding of coverage and affirmed the compensation awards entered by the administrative law judges on remand from the

Board. The court of appeals specifically declined to decide the correctness of the Board's ruling that no one who would have been covered under the original Act is excluded from coverage under the 1972 amendments (Pet. App. A-6). The court agreed with the Board, however, that pre-1972 decisions establishing the maritime character of particular kinds of employment are relevant in determining the extent of coverage under the amended Act (*id.* at A-5 to A-6). The court of appeals reaffirmed its holding under the original Act that "a dry dock is peculiarly a maritime facility" and therefore that "employees building and repairing dry docks are engaged in maritime employment" (*id.* at A-6). The court further ruled that "employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments" (*ibid.*).

Similarly, the court of appeals agreed that Stewart and Joyner met Section 3(a)'s "situs" requirement. The court noted that, even before the 1972 amendments, it had held that "the site of a dry dock, which was formerly navigable water and would be used against in support of navigation, remained a part of the navigable waters of the United States during construction of the dock" (Pet. App. A-7). The court ruled that the 1972 amendments "did not change this interpretation of the Act," but that the amendments did establish that "the shipyard adjacent to the dry dock is also part of the navigable waters" (*ibid.*).

ARGUMENT

1. The decision of the court of appeals is correct and does not conflict with the decisions of any other circuit. Contrary to petitioners' assertion, this case presents only the narrow question of coverage for workers constructing dry docks at a new shipyard, a question that only the Fourth Circuit has considered. As the court of appeals recognized (Pet. App. A-6), this case does not require resolution of the broad question whether all injuries for which compensation was available under the original Act remain compensable under the 1972 amendments. See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 n.25 (1977). Rather, both injured workers were harborworkers employed in the construction of a shipbuilding facility adjacent to a navigable waterway. They were engaged in a traditional form of "maritime employment" that remains "maritime employment" within the meaning of Section 2(3) of the Act, and their injuries occurred on the "navigable waters of the United States" within the meaning of Section 3(a). This case therefore does not present an occasion to decide any general issue regarding the 1972 amendments' coverage of persons who work on or near the water in a non-cargo-handling capacity. Review by this Court is not warranted.

In construing the "maritime employment" requirement of Section 2(3), the court of appeals properly relied on its pre-1972 case law holding that the building or repair of a dry dock is a "maritime" function.

See the cases cited at page 6, *supra*. The court acknowledged that, before 1972, coverage under the Act did not depend on whether the injured worker satisfied the "maritime employment" status test now included in Section 2(3). Nonetheless, the court stated that the cited pre-1972 cases retain their precedential value, because (Pet. App. A-6):

> [w]e did not base coverage on the simple proposition that the employers were engaged in maritime commerce. Instead, we examined the work of the individual claimants and concluded that it was maritime employment. In reaching this decision, we emphasized that a dry dock is peculiarly a maritime facility.

Contrary to petitioners' assertion, none of the decisions on which they rely (Pet. App. A-11 to A-12) conflicts with the court of appeals' ruling that employees building a dry dock are engaged in "maritime employment." The cases cited merely held that employees engaged in certain types of work—different from that of Stewart and Joyner— were not engaged in "maritime employment" within the meaning of Section 2(3). In *Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976), for example, the court held that the amended Act did not cover a lumber mill "pond man" who was injured on a floating walkway on a bay while sorting floating logs that had arrived at the mill by water and pushing them onto a conveyor that pulled them into the mill. The court reasoned that the worker's employment was not "maritime" in a traditional

sense. Similarly, in *Thibodaux* v. *Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979), the court ruled that an oil field worker who could only reach a particular job site by boat was not "engaged in maritime employment" when he drowned en route to the site. And in *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533, 542-543 (5th Cir. 1976), the court held that a worker named Charles Skipper, injured in the course of dismantling a building in a former shipyard so that it could be transported and reassembled for use at an inland industrial site, was not "engaged in maritime employment" at the time he was hurt.[1] None of these opinions questioned the "maritime" character, for purposes of Section 2(3), of employment that had been established as "maritime" under traditional prin-

[1] As petitioners observe (Pet. 12 n.3), Skipper was the only one of the five workers involved in *Jacksonville Shipyards* whose case did not come to this Court. The recent decisions in *Northeast Marine Terminal Co.* v. *Caputo, supra*, and *P.C. Pfeiffer Co.* v. *Ford*, No. 78-425 (Nov. 27, 1979), cast doubt on the continued validity of the court of appeals' ruling with respect to Skipper. He was a ship repairman who satisfied the status requirement in Section 2(3) by virtue of his occupation, which was one of those specifically mentioned in the statute. This Court's decisions establish that Section 2(3) focuses on particular occupations and that persons engaged in those occupations are covered by the Act, regardless of their particular duties at the time of injury. A person engaged in one of the occupations listed in Section 2(3) does not walk into and out of coverage according to the task he is assigned at a given moment. *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 272-274; *P.C. Pfeiffer Co.* v. *Ford, supra*, slip op. 14.

ciples. Even if *Weyerhaeuser*, *Thibodaux*, and *Jacksonville Shipyards* (*Skipper*) were correctly decided, they do not detract in any way from the result reached in this case.[2] Stewart and Joyner were "har-

[2] As petitioners emphasize (Pet. 15, 20-22), the court of appeals' approach in *Weyerhaeuser* differs substantially from the reasoning in *Fusco* v. *Perini North River Assoc.*, 601 F.2d 659 (2d Cir. 1979), vacated and remanded, No. 79-759 (Jan. 14, 1980). *Weyerhaeuser* held that an employee is engaged in "maritime employment" within the meaning of Section 2(3) only if his job bears "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' " (528 F.2d at 961). *Fusco*, on the other hand, stressed that the 1972 amendments were intended to expand the coverage of the Act and held that "any person whose principal duties are performed on navigable waters as that term was understood before 1972" is covered by the amended statute, regardless of the nature of his work. 601 F.2d at 669.

This Court has remanded *Fusco* for reconsideration by the court of appeals, because the Second Circuit's *exclusively* geographical approach and its misapplication of Section 2(4)'s definition of a statutory "employer" conflict with the interpretation of the Act adopted in *Northeast Marine Terminal Co.* v. *Caputo, supra, and P.C. Pfeiffer Co.* v. *Ford, supra.* See also *Walter Tantzen, Inc.* v. *Shaughnessy*, 601 F.2d 670 (2d Cir. 1979), vacated and remanded, No. 79-1329 (Apr. 21, 1980).

We believe that the Ninth Circuit's rationale in *Weyerhaeuser* is also deficient, but for different reasons. *Weyerhaeuser*'s restrictive reading of the "maritime employment" requirement in Section 2(3) ignores the congressional intent to expand the Act's coverage in 1972 and gives insufficient weight to the place of an injury's occurrence in determining whether a worker was engaged in maritime employment at the time he was hurt.

Because Stewart and Joyner were engaged in an occupation that not only is explicitly listed in Section 2(3) but also quali-

borworkers" under Section 8(3), and that is all that is necessary to satisfy the status requirement of the amended Act.

2. The court of appeals correctly determined that Section 3(a)'s situs requirement was satisfied, because Joyner and Stewart sustained their injuries "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel)." The court ruled that the statutory definition of "navigable waters" includes dry docks and adjacent shipyard areas that are under construction, especially when the construc-

---

fies as "maritime employment" under traditional definitions developed before 1972, this case presents no occasion for the Court to reconcile the disparate approaches followed in *Weyerhaeuser* and *Fusco*. Moreover, in addition to the Second Circuit's reconsideration on remand in *Fusco*, the Ninth Circuit will soon have its first opportunity since *Weyerhaeuser* to consider the application of the Act to workers not involved in cargo-handling activities. Three cases involving injuries to marine construction workers are currently pending in the Ninth Circuit, and the court of appeals' decisions there, rendered in light of the substantial intervening litigation in this Court and elsewhere, may well confine *Weyerhaeuser* to its peculiar facts and eliminate any important differences between the Ninth Circuit and other courts of appeals. See *Nold* v. *Guy F. Atkinson Co.*, Nos. 79-7109, 79-7127; *Massman Construction Co.* v. *Silva*, No. 79-7129; and *Ramos* v. *Universal Dredging Corp.*, Nos. 79-7257, 79-7285, 79-7302. Intervention by this Court ultimately may prove necessary, but it should await further developments in the courts of appeals.

tion site is located on land reclaimed from actual navigable waters, as in this case.

In support of their position with respect to the situs requirement, petitioners cite only *Jacksonville Shipyards, Inc.* v. *Perdue*, *supra*. The Fifth Circuit there held that Skipper's injury did not occur on the "navigable waters of the United States" within the meaning of Section 3(a). Skipper was injured at a former shipyard facility that had not been used for approximately a year (539 F.2d at 542-543). The Fifth Circuit's decision is readily distinguishable from the ruling below. Joyner and Stewart were working in an area that was formerly part of a navigable river. The area was being converted into a shipyard and dry dock, facilities that unquestionably fall within Section 3(a)'s definition of "navigable waters." The only question, then, is whether the area continued as "navigable waters" without interruption during the construction process. By contrast, in *Jacksonville Shipyards*, the question was whether an area could retain its "navigable waters" character a year after its use as a shipyard had ended. No future plans regarding the shipyard were involved, and the yard was not in the process of conversion from one form of "navigable waters" to another. To be sure, the court of appeals in *Jacksonville Shipyards* stated that the situs of injury must meet the statutory requirements at the time of the injury and that "[i]t will not suffice if the area was so used [as 'navigable waters'] only in the past, or if such uses

are merely contemplated for the future." 539 F.2d at 541. But the reference to future maritime use was *dictum*, because there was no such planned usage in the case before the court. And, in any event, the Fifth Circuit did not consider a factual situation like that presented here, in which acceptance of petitioners' argument would mean that an area indisputably within the statutory coverage would temporarily lose its character as "navigable waters" solely because its owner sought to convert it to a different use also falling clearly within the statutory definition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

JOSHUA T. GILLELAN II
MARY-HELEN MAUTNER
KERRY L. ADAMS
Attorneys
Department of Labor

MAY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 319866 305

Supreme Court, U. S.
FILED
MAY 27 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1136

BROWN & ROOT, INC. AND TRAVELERS INSURANCE COMPANY,

Petitioners

versus

MARY M. JOYNER, (widow of ARTHUR E. JOYNER), BENJAMIN F. STEWART and the BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondents

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN OPPOSITION SUBMITTED BY FEDERAL PARTY-IN-INTEREST

C. Michael Montgomery
George M. Kelley III
Seawell, McCoy, Dalton, Hughes,
Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510
Telephone: (804) 622-5341
Counsel for Petitioners

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1136

BROWN & ROOT, INC. AND TRAVELERS INSURANCE COMPANY,

Petitioners

versus

MARY M. JOYNER, (widow of ARTHUR E. JOYNER), BENJAMIN F. STEWART and the BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondents

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION SUBMITTED BY FEDERAL PARTY-IN-INTEREST

C. Michael Montgomery
George M. Kelley III
Seawell, McCoy, Dalton, Hughes,
Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510
Telephone: (804) 622-5341
Counsel for Petitioners

I N D E X

PAGE

PETITIONERS' STATEMENT IN REPLY 1

NEW ISSUES RAISED BY BRIEF IN OPPOSITION 2

ARGUMENT 3

CONCLUSION 12

C I T A T I O N S

Cases:

Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 9

Newport News Shipbuilding & Drydock Co. v. O'Hearne, 192 F.2d 968 8

Massman Construction Co. v Bassett, 30 F.Supp. 813, reversed on other grounds, 120 F.2d 230, 8th Cir. cert. denied 314 U.S. 648, 62 S.Ct. 92 (1940) 10

Motteler v. J. A. Jones Construction Co., 457 F.2d 917 (7th Cir. 1972) 10

P. C. Pfeiffer Co. v. Ford, U.S. 100 S.Ct. 328 (1979) 2, 4, 9

Pennsylvania Railroad Co. v. O'Rourke, 44 U.S. 334, 73 S.Ct. 302 (1953)..... 6

Perini North River Assoc. v. Fusco, No. 79-759 ..... 2, 9

Travelers Insurance Co. v. Branham, 136 F.2d 873 7

PAGE

Travelers Insurance Co. v. McManigal, 139
F.2d 949 7

Statutes:

Longshoremen's and Harbor Worker's Compensation
Act, 33 U.S.C. 901 et seq 3

Section 2(3), 33 U.S.C. 902(3) ... 3

Section 3(a), 33 U.S.C. 903(a) ... 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979
NO. 79-1136

BROWN & ROOT, INC. AND TRAVELERS INSURANCE COMPANY,

Petitioners

versus

MARY M. JOYNER (widow of ARTHUR E. JOYNER), BENJAMIN F. STEWART and the BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondents

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION SUBMITTED BY FEDERAL PARTY-IN-INTEREST

The Petitioners herein, Brown & Root, Inc. and Travelers Insurance Company, submit

their Brief in reply to the Brief in Opposition submitted by the Federal Party-In-Interest. In doing so, said Petitioners do not waive their objections to the untimely filing of the Brief in Opposition by said Federal Party-In-Interest.

NEW ISSUES RAISED BY
THE BRIEF IN OPPOSITION

I. THAT THE FACTS SUPPORT AN ASSERTION THAT THE CLAIMANT-RESPONDENTS WERE INJURED IN, WITHIN OR ON THE FLOOR OF A DRYDOCK.

II. THAT "TRADITIONAL" MARITIME EMPLOYMENT IS FOUND IN PRE-1972 CASE LAW AND THAT SUCH SHALL BE A GUIDE FOR MAKING THE MARITIME EMPLOYMENT DETERMINATION OF SECTION 2(3) OF THE ACT.

III. THAT THE CLAIMANT-RESPONDENTS WERE "HARBOR WORKERS" WITHIN THE MEANING OF THAT TERM AS IT APPEARS IN THE ACT.

IV. THAT THE REMAND OF PERINI NORTH RIVER ASSOC. v. FUSCO, NO. 79-759, CURES THE CONFLICT NOW EXISTING AMONG THE CIRCUITS.

V. THAT THE SITUS REQUIREMENT OF SECTION 3(A) OF THE ACT IS SATISFIED BY A CONSTRUCTION SITE'S PREVIOUS CONDITION, COMBINED WITH ITS "INTENDED USE".

ARGUMENT

1. In order to determine the threshold question of coverage under the Longshoremen and Harbor Worker's Compensation Act,[1] the facts of the claimant's employment and the locality of his injury must be understood. As stated by this Court in P.C. Pfeiffer Co., Inc. v. Ford, U.S. 100 S.Ct. 328 (1979), the amended Act prescribes two tests, one of status[2] embodying the concept of the nature of the claimant's occupation, and another of situs[3], invoking the geographical limitations of the Act itself. Without a thoughtful,

---

[1]33 U.S.C. Section 901 et seq. as amended, 1972, hereinafter referred to as the Act.

[2]Section 2(a); 33 U.S.C. 902(3), hereinafter referred to as the status or maritime employment test or requirement.

[3]Section 3(a); 33 U.S.C. 903(a), hereinafter referred to as the situs test or requirement.

accurate analysis of the facts, no interpretation of the coverage provisions of the Act can give adequate guidance to those who must obey and interpret this law.

The facts are presented by the Federal Party-In-Interest, in a way that is misleading. To the extent that this reflects the approach taken by the Fourth Circuit, it is contrary to this Court's requirement, as stated in P. C. Pfeiffer Co., Inc. v. Ford, supra, that the claimant's overall employment function be considered.

To say that the Claimant-Respondents herein were "engaged in" building a drydock, is to mislead by implying that construction work associated with the drydock was their exclusive or paramount activity. Indeed, the contrary was most probably true. The plain fact is that both Claimant-Respondents were doing work ordinarily associated with their construction occupations, on this parti-

cular job site, in the vicinity of a drydock under construction. The drydock under construction, was only one of many parts of an overall construction project. The Claimant-Respondents were not injured upon navigable waters as same has been interpreted at any time during the pre-amendment history of the Act. They were injured on dry land, They were not injured within, in or on the floor of any drydock, under construction or otherwise.

2. The Federal Party-In-Interest maintains that the Fourth Circuit has gone beyond a rote application of pre-1972 case law, and has reached its result as to the Claimant-Respondents by determining what is "traditional" maritime employment for employees not engaged in handling cargo. The guideline for this determination is evidently that welter of pre-1972 case law dealing with the "maritime but local" doctrine. This accentuates, rather

than cures, the conflict in approach between the Fourth Circuit and the Fifth and Ninth Circuits, which has produced such divergent results.

Although the Petitioners herein would not employ pre-1972 case law to make the maritime employment determination, they would note that the Federal Party-In-Interest's interpretation of the Fourth Circuit's opinion would place it squarely in conflict with this Court's decision in Pennsylvania Railroad Co. v. O'Rourke, 44 U.S. 334, 73 S.Ct. 302 (1953). In O'Rourke, this Court found that a railroad employee was covered under the Act when he fell from a railroad car, as same was being unloaded from a floating barge. In support of its affirmation of coverage, which admittedly ignored the railroading nature of the claimant's work and admittedly rejected the argument that the employee must have a status of "maritime employment" under the Act as it then appeared,

the Court held that compensation was payable, the nature of the railroad employee's work notwithstanding. This Court stated:

> "Compensation under the Harbor Worker's Act could not have been paid in connection with his (the railroad employees) death if we were to test its applicability by the nature of his regular work. A number of lower court cases are in a similar vein. Those we collect in the margin deal with various types of construction and service workers, obviously not themselves engaged in traditional 'maritime employment', if one were to look solely to the particular type of job they were engaged for."[7]
>
> [7] Baizley Iron Works v. Span, 281, U.S. 222, 50 S.Ct. 306, 74 L.Ed. 819 (a painter); De Bardeleben Coal Corp. v. Henderson, 5 Cir., 142 F.2d 481 (member of shore gang); Travelers Insurance Co. v. McManigal, 4 Cir. 139 F.2d 949 (carpenter); Travelers Ins. Co. v. Branham, 4 Cir. 136 F.2d 873 (foreman of a concrete pouring gang); Standard Dredging Corp. v. Henderson, D.C. 57 F. Supp. 770 (member of shore gang); Ford v. Parker, D.C. 52 F. Supp., 98 (watchman). This list is illustrative but by no means exhaustive. (Emphasis added).

If the Federal Party-In-Interest and the Fourth Circuit hold that Travelers Insurance Co. v. McManigal, 139 F.2d 949 (4th Cir. 1944), Travelers Insurance Co. v. Branham, 136 F.2d

873 (4th Cir. 1943), and Newport News Shipbuilding & Drydock Co. v. O'Hearne, 149 F.2d 968 (4th Cir. 1951), define what is "maritime employment", then they are clearly in conflict with this Court.

3. The Federal Party-In-Interest has stated that the Claimant-Respondents herein were "harbor workers". Although the Fourth Circuit specifically avoided the determination of whether the definition of "harbor worker", proposed by the Benefits Review Board, was in conformance with the intent of Congress, the Federal Party-In-Interest has applied the label "harbor worker", and proposes that the application of the label brings the Claimant-Respondents within the terms of the Act.

The term "harbor worker" is nowhere defined in the Act, and the term is not addressed in the legislative history of the 1972 amendments of the Act. If, as asserted by the Federal Party-In-Interest, the Fourth

Circuit has applied a label, without fully analyzing the job functions of the claimants under all surrounding facts, then the Fourth Circuit is in conflict with this Court's direction in P.C. Pfeiffer Co. v. Ford, supra.

4. The remand of Perini North River Assoc. v. Fusco, No. 79-759, vacated and remanded January 14, 1980, does not cure the conflicts which now exist between the Fourth Circuit and the Fifth and Ninth Circuits. Rather, the Court's remand creates a situation wherein the Second Circuit must decide the same issue as presented here. Without direction from this Court, it is likely that the Second Circuit's decision, whatever be its result, will be petitioned to this Court. Judicial economy will not be served by delaying the consideration of this question by refusing the petition herein.

5. The situs question addressed in the case of Jacksonville Shipyards, Inc. v.

Perdue (Skipper), 539 F.2d 533 (5th Cir. 1976), is the only post 1972 dicusssion of that test in terms of time frame. The Fifth Circuit's decision squarely supports the Petitioners' position that a shipyard under construction, although on fill land, was not part of "navigable waters" as that term appears under the amended Act. The conflict with the Fourth Circuit's decision herein, cannot be erased.

Although the Petitioners do not agree with the analysis, if the Federal Party-In-Interest and the Fourth Circuit are to maintain that pre-1972 case law is applicable to the issues herein, then the cases of Motteler v. J. A. Jones Construction Co., 457 F.2d 917 (7th Cir. 1972) (decided under the old Act) and Massman Construction Co. v. Bassett, 30 F. Supp. 813 (1940), rev'd on other grounds, 120 F.2d 230 (8th Cir. 1941) cert. denied 314 U.S. 648, 62 S.Ct. 92, must be considered. In

both cases, construction worker-claimants were injured within the confines of coffer dams. Such dams are used to facilitate construction and render dry land, what had previously been navigable waters. In both cases, the Courts recognized that navigable waters could cease to be such, by the efforts of man. The fact that coffer dams are impliedly temporary structures, the fact that same would eventually be removed, and thereafter, the navigable waters returned, was not thought by these Courts sufficient to deny the obvious. The enclosed land was no longer water. Its future use or condition had no bearing on the issues at hand. Under the logic employed by the Federal Party-In-Interest, the Fourth Circuit would therefore, be rendered in conflict with the Seventh and Eighth Circuits on the situs issue.

The "intended use" test, ascribed by the Federal Party-In-Interest to the Fourth Circuit,

likewise, has no support in logic. The Fourth Circuit clearly erred in its situs analysis, by placing the Claimant-Respondent inside the drydock at the time of their injuries. This was clearly contrary to the facts. The error cannot be salvaged by the Federal Party-In Interest's construction of an "intended use" test.

CONCLUSION

To resolve the conflict among the Circuits and to resolve important issues of statutory construction now vexing the lower Courts and the parties that must be guided thereby, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

C. Michael Montgomery
George M. Kelley III
Seawell, McCoy, Dalton, Hughes,
Gore & Timms
936 Wainwright Building
Norfolk, Virginia 23510
Telephone: (804) 622-5341
Counsel for Petitioners